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In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

UNITED STATES OF AMERICA, APPELLANT

v.

THE PHILADELPHIA NATIONAL BANK AND GIRARD TRUST CORN EXCHANGE BANK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra,* 1a-49a) is not yet reported.

JURISDICTION

The judgment of the district court was entered on January 15, 1962 (App., *infra,* 50a). The notice of appeal was filed by the United States on February 26, 1962. The jurisdiction of this Court is conferred

by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Columbia Steel Co.*, 334 U.S. 495; *United States* v. *duPont & Co.*, 353 U.S. 586.

QUESTION PRESENTED

The ultimate question presented by this appeal is:

1. Whether the proposed consolidation of The Philadelphia National Bank and Girard Trust Corn Exchange Bank violates the antitrust laws because it is a combination in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, or its effect may be substantially to lessen competition or to tend to create a monopoly, in violation of Section 7 of the Clayton Act.

Subsidiary to the appraisal of the effects of the consolidation upon competition are the following questions:

2. Whether the four-county area in which the defendants maintain offices and from which they derive most of their business is an appropriate geographical market in which to measure the effects of the consolidation upon competition.

3. Whether the proposed consolidation constitutes an acquisition of stock or other share capital within the meaning of Section 7 of the Clayton Act, and, hence, is subject to that section.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in pertinent part:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor * * *.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> Sec. 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

*   *   *   *   *

STATEMENT

The proposed consolidation of The Philadelphia National Bank ("PNB") and Girard Trust Corn Exchange Bank ("Girard") was approved by their boards

of directors on November 15, 1960 (Fdg. 22[1]). As required by the Federal Deposit Insurance Act, 74 Stat. 129, 12 U.S.C. (Supp. II) 1828(c), the proposed merger was submitted to the Comptroller of the Currency for his approval (see 12 U.S.C. (Supp. II) 215(a)).

The Attorney General (Ex. G-162), the Federal Reserve Board (Ex. G-161), and the Federal Deposit Insurance Corporation (Ex. G-163) all reported that the merger would have substantial anticompetitive consequences in the four-county Philadelphia metropolitan area; the Comptroller, however, approved the merger on February 24, 1961 (Fdgs. 27, 463, 464). The complaint in the present case, filed on February 25, 1961, charged that the proposed consolidation was a combination in unreasonable restraint of trade and commerce and, if carried out, would eliminate all competition between defendants, in violation of Section 1

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[1] "Fdg." refers to those findings proposed by the government which were specifically adopted by the district court (App. 43a-45a). "Govt. Prop. Fdg." refers to those proposed findings (Govt. Prop. Fdgs. 402-431), setting forth statistics concerning the defendants' share of business in the four-county Philadelphia metropolitan area which the government contended was the relevant geographical market (see *infra*, pp. 15-19). The statistics were rejected by the court not because of any dispute as to their accuracy, but solely because the court considered them irrelevant "since they presuppose a four-county relevant market which the court has found to be nonexistent" (App. 44a). In its opinion, the court explicitly accepted the correctness of the statistics (App. 6a-7a), and utilized them in its arguendo analysis of the four-county market (App. 34a-35a; see *infra*, pp. 10, 11). Those statistics are therefore relied upon here without reference to underlying exhibits. "Defts. Fdgs." refers to those findings proposed by defendants which were specifically adopted by the district court (App. 45a).

of the Sherman Act; and that the effect of the proposed merger might be substantially to lessen competition or to tend to create a monopoly, in violation of Section 7 of the Clayton Act. The consolidation has not yet taken place, and, in accordance with a stipulation entered into by defendants and the government, the consolidation will not take place pending the outcome of this appeal.

After extensive discovery, the case was tried before Chief Judge Clary from June 5 to August 3, 1961. The trial record consists of a 4,000-page transcript of testimony and approximately 300 exhibits, most of which are internal documents of the defendants and various statistical analyses. The parties presented evidence on the nature of commercial banking as compared to other financial institutions, and the nature of competition between commercial banks; the origin of defendants' business and other factors relevant to establishing the geographical market; the scope of defendants' business and the competition between them which would be eliminated by the proposed merger; the present concentration of commercial banking, the increase which would result from the merger, and the impact of the merger upon competition; the prior mergers of the defendants; and an appraisal of the reasons advanced by the banks for the proposed consolidation.

1. *The merging banks.*—PNB is the second largest commercial bank and Girard is the third largest commercial bank in the four-county Philadelphia metropolitan area. As of June 30, 1960, PNB had total

assets of $1,086,147,170, deposits of $946,306,784, and loans of $523,612, 316, and Girard had total assets of $740,920,000, deposits of $650,790,000, and loans of $399,362,000. Each conducts a general commercial banking business—PNB through 28 offices (11 located in Philadelphia and 17 in Delaware, Bucks, and Montgomery Counties) and Girard through 38 offices (20 located in Philadelphia and 18 in Delaware and Montgomery Counties).[2] (Fdgs. 7-8, 12-13; 394; PNB Answer, Par. 8; Girard Answer, Par. 9.) The percentage of the dollar volume of PNB and Girard, respectively, which originated in these four counties was as follows: 54% and 63% of their commercial and industrial loans; 75% and 70% of their loans to individuals; 74% and 84% of their real estate loans; 41% and 62% of their lines of credit; 94% and 72% of their personal trusts; 81.4% and 94% of their time and savings deposits; 55.8% and 77.2% of their demand deposits (Fdgs. 258-282).

As of June 1960, of the more than $5 billion in assets held by the 42 commercial banks with head offices in the four-county Philadelphia metropolitan area, PNB had 21%, Girard, 14.7%, and the consolidated bank would have had about 35.7%. Of almost $1.25 billion in commercial and industrial loans of the 42 banks, PNB had 24.3%, Girard, 16.5%, and the consolidated bank would have had 40.8%. As of October 1960, of the total deposits of more than $4.6 billion in the 42 banks,

[2] Pennsylvania law permits banks to open offices in their home county and in any contiguous county (7 Pa. Stat. 819-204.1 (Purdon's ed. Supp.); Tr. 2301). PNB and Girard, with home offices in Philadelphia County (coincident with the City of Philadelphia), may open branches only in Philadelphia, Delaware, Bucks, and Montgomery Counties.

PNB had 21.3%, Girard, 14.5%, and the consolidated bank would have had 35.8%. (Govt. Prop. Fdgs. 404-405, 410-411, 419.) [3]

Defendant banks have played an active role in the substantial increase in the concentration of commercial banking in recent years. From 1947 to 1960, the number of commercial banks with head offices in the four-county area dropped from 108 to 42 (App. 39a-40a). Since 1950, PNB has acquired 9 banks operating 18 offices in the four-county area, while Girard has acquired 6 banks operating 32 offices. For PNB and Girard, respectively, these acquisitions have accounted, during the decade 1950-1959, for 63% and 91% of the deposit growth, 12% and 37% of loan growth, and 59% and 85% of asset growth (Fdgs. 432-458).

The proposed consolidated bank will alter radically the existing competitive situation among all commercial banks with head offices in the four-county area. Instead of two front-running banks of approximately equal size—First Pennsylvania Banking & Trust Co. and PNB—with smaller competitors of decreasing size beginning with Girard, the proposed consolidated bank

[3] Other statistics showing the positions of PNB, Girard, and the proposed consolidated bank among commercial banks in the four-county area are as follows, using 1960 data in the record (Govt. Prop. Fdgs. 402-431):

	PNB (%)	Girard (%)	Total (%)
Number of offices	9.5	13.4	22.9
Capital funds	19.6	15.5	35.1
Total loans	19.8	14.6	34.4
Loans to individuals	10.8	15.4	26.2
Real estate loans	20.1	10.4	30.5
Personal trusts (omitting 7 banks with small trust activities)	3.8	23.5	27.3
Total IPC deposits (of individuals, partnerships, and corporations)	16.8	15.6	32.4
Time deposits	14.7	15.[illegible]	29.9
Demand deposits	21.9	14.7	36.6
IPC demand deposits	18.2	15.9	34.1

will be far larger than any of its competitors. With respect to total deposits, the merged bank will be 1.6 times the size of its nearest rival and 3.6 times the size of the next largest bank; with respect to total net loans, the bank will be 1.5 times the size of its nearest rival and 3.3 times the size of the next largest bank; with respect to total capital funds, the bank will be twice the size of its nearest rival and three times the size of the next largest bank (Ex. G-196).[4]

2. *The agreement of consolidation.*—The agreement of consolidation between the two banks (Ex. G-119) was made pursuant to the authority given by, and in accordance with the express terms of, 12 U.S.C. (Supp. II) 215. Under Section 1 of the agreement, the two banks are to be consolidated under the PNB charter. Section 5 provides that the resulting consolidated "Association shall be deemed to be the same corporation as each of the Consolidating Banks * * *," but that "[t]he corporate existence of Girard

[4] The effect of the proposed consolidation on the relative size of the six largest banks in the four-county area, as of 1960, will be as follows (Ex. G-196):

	Relative size (largest equals 100)		
Banks	Total deposits	Total net loans	Total capital funds
Before Consolidation			
First Pa. B & T Co.	100	100	100
PNB	97	83	99
Girard	65	62	79
Provident Tradesmens B & T Co.	45	43	61
Fidelity Phila. Trust Co.	42	38	46
Central-Pa. Nat'l Bank	24	25	26
After Consolidation			
Consolidated Bank (PNB & Girard)	100	100	100
First Pa. B & T Co.	62	69	56
Provident Tradesmens B & T Co.	28	30	34
Fidelity Phila. Trust Co.	26	26	26
Central-Pa. Nat'l Bank	15	17	15
Broad Street Trust Co.	8	10	7

shall be merged into and continued in Philadelphia National, which shall continue in existence as the Association * * *." All property rights, franchises, and interests of the two banks are to be vested in the consolidated bank without any conveyance or transfer, and the consolidated bank is to be responsible for all the liabilities of the two banks. Under Section 6, each share of outstanding PNB stock "shall remain outstanding as one share of the capital stock of the [consolidated] Association * * *," and each share of outstanding Girard stock "shall be converted into 1.2875 shares of the capital stock of the Association * * *." Section 6 further provides that each holder of outstanding PNB stock "shall retain his certificate, which shall automatically remain a certificate representing shares of stock in the Association * * *." On the other hand, "each holder of an outstanding certificate representing shares of Girard stock shall surrender the same to the Association promptly after the Effective Date and receive in exchange therefor certificates representing the full number of whole shares of stock in the Association to which such shares of stock in Girard shall have been converted * * *."

3. *The district court's decision.*—The district court considered two preliminary issues with respect to the coverage of bank mergers under the antitrust laws. The court decided, favorably to the government, that approval of the merger by the Comptroller of the Currency does not exempt it from the antitrust laws (App. 12a-17a). The court further held, however, that the merger was not subject to Section 7 of the Clayton

Act (App. 17a-21a) on the ground that no acquisition of "stock or other share capital" was involved. For purposes of discussing the remaining issues, the court assumed *arguendo* that Section 7 of the Clayton Act was applicable (App. 21a).

Turning to the delineation of the relevant market, the court held that commercial banking as a whole—with its conglomeration of services and functions—constitutes a separate and distinct line of commerce for purposes of the Clayton Act, or a relevant product market for purposes of the Sherman Act (App. 24a-28a). The court decided, however, that the government had failed to prove that the four-county Philadelphia metropolitan area in which defendants maintain offices was a relevant section of the country for purposes of the Clayton Act, or a relevant geographical market for purposes of the Sherman Act (App. 29a-31a). It stated that the relevant section of the country must include "at the very least" the entire Delaware Valley and New York City, and probably includes the greater part of the northeastern United States. No statistics as to the competition of outside banks in the larger market area were offered by either the government or the defendant-banks. In considering the remaining issues, the court assumed that the four-county area was the appropriate relevant market (App. 31a), just as it had previously assumed the applicability of Section 7 of the Clayton Act.

The competitive impact of the consolidation in the four-county area was discussed primarily in terms of Section 7 of the Clayton Act. The court posed as the

ultimate question, "whether, after considering all of the relevant factors, there is a reasonable probability of a significant reduction in the vigor of competition" (App. 32a-33a), and discussed a number of subsidiary factors which it considered relevant.[5]

The court cited the percentages of PNB, Girard, and the proposed consolidated bank in assets, loans, and deposits among the other banks with head offices in the four-county area and noted, as defendants' rebuttal, the concentration figures in other cities, indicating that in many other cities the leading bank has higher percentages. Although the defendants' statistics were said to be "not decisive" (but "worthy of mention and consideration"), those statistics were the only basis indicated for the court's conclusion that "no dangerously potential concentration will result from this merger" (App. 34a-36a).[6]

The district court found that "PNB and Girard do engage in substantial direct competition one with the other" which would be eliminated. But it also found

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[5] The court stated seven subsidiary "relevant questions," as follows (App. 34a): (1) How much of an increase in concentration will be brought about by the merger? (2) Will the increase in concentration give the merged banks the power to control the price and supply of banking services? (3) Will the merger eliminate a substantial competitor from the market? (4) What is the competitive situation among commercial banks in the relevant market today? (5) What will probably be the competitive situation after the merger? (6) What is the probability of a new commercial bank coming into existence in the four-county area? (7) What is the history of defendants with respect to prior mergers?

[6] On the second question posed, the court found that the merged bank will not have the power to control the price and supply of banking services in the four-county area (App. 36a-37a). The government had not contended that it would have such power.

that "elimination of one competitor will not result in a lessening of vigorous competition in the commercial banking field" (App. 37a). For this conclusion, the court relied upon testimony by defendants' witnesses that the vigorous competition between commercial banks in the Philadelphia area would not be lessened, but would be intensified. Even though an important competitor would be eliminated, the court considered the remaining 40 commercial banks as representing available alternatives up to their respective lending limits (the maximum amount which can be loaned to any one borrower, fixed by law at 10% of a bank's capital and surplus). It found that small and medium-size borrowers have adequate sources for their loans and that the larger borrowers are not limited to Philadelphia (App. 37a-39a).

As to the remaining factors, the court noted the decline in the number of commercial banks in the four-county area, but, on the basis of the successful establishment of one new bank in the last decade, it declined as "pure conjecture" to find that entry of a substantial new competitor in the market was unlikely (App. 39a-40a). The defendants' prior mergers were explained as motivated by valid business reasons—to follow customers into suburban areas and to solve problems of the smaller merged banks (App. 40a). In concluding the Clayton Act discussion, the court stated (App. 40a-41a): "Viewing all this collectively, the Court can see no reasonable probability that competition among commercial banks in the four-county area will be substantially lessened. * * * [T]his particular merger will not tend to create a monopoly."

Finally, the court turned briefly to consideration of the Sherman Act and held (App. 41a-43a) that "a merger which does not violate the Clayton Act can hardly be held to violate the more stringent standards of the Sherman Act." Citing *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-528, for the guidelines to be considered, the court stated without further discussion that "the proposed merger meets the 'reasonable' test and does not violate Section 1 of the Sherman Act."

THE QUESTIONS ARE SUBSTANTIAL

The proposed merger of the second and third largest commercial banks in the four-county Philadelphia metropolitan area with assets of one billion and three quarter billion dollars, respectively, would result in their becoming the largest bank in the area, far ahead of other banks, with approximately 35% of the business. The validity of this merger presents questions of marked importance in the application of the antitrust laws to horizontal combinations of competitors, and specifically, in this case, to horizontal combinations in the field of commercial banking. If the decision below represents the law, the antitrust laws will be largely impotent to cope with the current wave of commercial bank mergers. Because of the significance of the present case and the errors committed by the district court, probable jurisdiction should be noted.

The merger in the present case is a classical horizontal combination between direct substantial competitors, of a kind which this Court has not considered since the railroad merger cases in the 1920's. Moreover, the decision below is the first ruling on the merits

in an antitrust action filed by the Department of Justice against a proposed bank merger.[7] Two subsequent suits are now pending against bank mergers in which the government alleges violation of both the Sherman Act and Section 7 of the Clayton Act;[8] another suit is pending against a bank merger in which the government alleges only a violation of the Sherman Act;[9] and another pending complaint challenges under Section 7 the acquisition of two banks by a holding company.[10] The unique and essential role of commercial banking in the nation's economy makes preservation

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[7] In *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C.A. 3), certiorari denied, 346 U.S. 901, the Federal Reserve Board sought to enforce Section 7 of the Clayton Act as authorized by Section 11 of that Act (15 U.S.C. 21). The court reversed on the ground that the Board's conclusion as to lessening of competition in a five-state area was inconsistent with its finding that the areas of effective competition were the banks' local communities. In *United States* v. *Firstamerica Corp.*, Civil Action No. 38139. U.S.D.C. N.D. Calif. (1959), acquisition of a bank by the defendant was challenged under Section 1 of the Sherman Act and Section 7 of the Clayton Act The district court denied a motion to dismiss which sought to bar the action on the ground of prior approval by the Federal Reserve Board. This Court denied a motion for leave to file a petition for a writ of certiorari (361 U.S. 928). The *Firstamerica* suit was subsequently resolved by entry of a stipulation pursuant to which Firstamerica undertook to divest itself of a newly-formed bank with approximately 67 bank offices and $600,000,000 of deposits.

[8] *United States* v. *Continental Illinois Bank and Trust Co. of Chicago, et al.*, Civ. Action No. 61-C-1441, N.D. Ill.; *United States* v. *Manufacturers Hanover Trust Co.*, Civ. Action No. 61-C-3194, S.D.N.Y. Trial has been completed in the New York case.

[9] *United States* v. *First National Bank and Trust Co. of Lexington, et al.*, Civ. Action No. 1424, E.D. Ky. Trial has been completed in this case.

[10] *United States* v. *Bank Stock Corp. of Milwaukee, et al.*, Civ. Action No. 61-C-54, E.D. Wis.

of competition in this field vital to the preservation of a competitive economy.

The district court dismissed the complaint upon holding that the merger was not subject to the Clayton Act; that the government had failed to show that the four-county area in which defendants maintain offices was an appropriate geographical market; and that, assuming *arguendo* the government's position on these points, the merger would not violate the Clayton Act or the Sherman Act. The government contends that the four-county area is a relevant geographical market, that the merger would violate Section 1 of the Sherman Act, and that it also is subject to and would violate Section 7 of the Clayton Act. These positions are, at the least, substantial and worthy of full presentation to the Court.

1. *The Relevant Geographical Market.*

The government presented to the court below evidence of defendants' position among commercial banks located in the four Pennsylvania counties—Philadelphia, Delaware, Bucks, and Montgomery—in which defendants and other Philadelphia-based banks may legally maintain offices. PNB has offices in all four counties; Girard in all except Bucks. The district court denied the significance of statistics for the four-county area upon the ground that the relevant market was "the greater part of the northeastern United States" in order to include virtually the entire territory "in which PNB and Girard compete" (App. 31a). It is true, of course, that PNB and Girard are direct and very substantial competitors wherever they oper-

ate—be it on the local, regional, national or international level—because they are both engaged in precisely the same business. The significant question for purposes of the antitrust laws, however, is what geographical market or markets are appropriate for measuring the substantiality of the competition to be eliminated between the two banks by the merger.

The Sherman Act proscribes restraint of "any part" of commerce, a term which "has both a geographic and a distributive significance." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61. Geographically, the Court has been satisfied in Sherman Act cases with finding sufficient "volume in the area which the alleged restraints affect" (*United States* v. *Columbia Steel Co.*, 334 U.S. 495, 520), or, in similar terms, that the subject of the restraint is "an appreciable segment" of commerce (*United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226).[11] The same approach was adopted by Congress in enacting the present geographical standard in Section 7 of the Clayton Act. As stated in the Senate Report on the 1950 amendment, a "section of the country" may be separately considered so long as it contains an "[a]ppreciable segment of the trade." S. Rep. No. 1775, 81st Cong. 2d Sess., p. 6.

In the present case, the four-county area proposed

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[11] The Court has limited the "relevant competitive market" in an acquisition case to eleven states within which the acquired company did business (*United States* v. *Columbia Steel Co.*, 334 U.S. 495, 519-520), and in conspiracy cases, to eight states in which the parties' papers were published and principally circulated (*Farmer's Guide Co.* v. *Prairie Co.*, 293 U.S. 268, 278-279), to four cities for which taxicabs were purchased for use by defendant companies, and to one city in which several defendants operated (*United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226, 229).

by the government was a highly appropriate geographical market for determining the effect of the merger on competition. In their reports and analyses of the merger to the Comptroller of Currency, both the Federal Reserve Board and the Federal Deposit Insurance Corporation regarded the four-county area as a distinct local market appropriate for purposes of analyzing the merger. As the Board stated, "[I]t is in the four-county area where the principal competitive impact of the proposal will fall and not in the out-of-State areas * * *. In all cases involving Philadelphia, Camden, Trenton and Wilmington banks, the [bank] examiners indicate that the primary competition is represented by the banks in the city where the subject institution is located. * * * The principal competitive effects of the proposal will, therefore, be local and not international or national." (Ex. G-161, pp. 1-2.) The banking agencies compared total resources and business of the defendants with those of the other banks with head offices in the four-county area, just as the government did in the court below.

The district court itself found that commercial banking as a whole was the relevant product market or line of commerce (App. 24a-28a). One would expect to find that most of the business of banks, both in terms of total dollar volume and in terms of customers served, is located in the local banking areas in which the banks have their head offices and branches. (See, *e.g.*, Tr. 369, 411, 1500-1501, 2055, 3246-3251; cf. *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163, 167 (C.A. 3)). Small and medium size customers perforce do business in the local banking areas (Tr. 3815-3817); there

is testimony that loans below $1,000,000 normally would not be made outside the four-county area (Tr. 3817). Only in the local banking area does a bank effectively provide many of the required commercial banking services for all its customers, large and small alike (Tr. 882, 2558-2565, 3260, 3547-3549, 3815-3817, 3936). Even PNB and Girard's largest customers have headquarters or substantial business operations which require a variety of commercial banking services in the four-county area (Tr. 2504-2510, 2830-2833). So close is the identity of the four-county area with the major share of the business of the two banks, that neither PNB nor Girard derives any substantial portion of its business from Camden, New Jersey, which is just across the river from Philadelphia.[12] In fact, an official of one of the two largest commercial banks in Camden, with assets of more than $140 million, testified that his ability to compete effectively in the Philadelphia area was adversely affected by the legal restrictions on his locating branch offices there (Tr. 3228, 3249-3251, 3261).[13] Finally, as indicated by the sta-

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[12] Camden is one county in the ten-county Delaware Valley area proposed as the relevant market by defendants, which includes the four-county area advanced by the United States (Defs. Fdg. 50). Camden and the other five additional counties combined accounted for only about 7% of defendants' commercial and industrial loans, 2% of individual demand deposits, 4% of their demand deposits of partnerships and corporations (Fdgs., Tables 3, 14, 17, pp. 50, 63, 66).

[13] On this point, defendants' arguments in the court below were inconsistent. At the same time as they sought to expand the geographical market to include other areas, defendants contended that branch expansion was vital to their service of suburban areas outside Philadelphia and that existing branches of PNB and Girard a few miles apart are not really competitive with each other (Com-

tistics in the Statement (*supra*, p. 6), most of the business of PNB and Girard originates in the four-county Philadelphia metropolitan area.[14] On the basis of these facts, the four-county area was clearly a relevant geographical market for purposes of the Sherman Act (or a relevant section of the country for purposes of the Clayton Act), and the district court's contrary ruling was plainly erroneous.

2. *Unreasonable Restraint of Trade under the Sherman Act.*

The significance of the present case is that it involves the elimination of substantial and direct competition between the second and third largest commercial banks in the four-county Philadelphia metropolitan area. The direct competition between PNB and Girard is not an incidental effect, involving a small part of their activities, but rather runs throughout the entire range of their respective businesses, including the handling

pare Defs. Fdgs. 52, 53, 99, 104, 105 with Defs. Fdg. 127). Moreover, in seeking to show the needs of the Philadelphia area for a larger bank, defendants implicitly assumed that, for certain of the banking needs of businessmen in the area, banks elsewhere are not satisfactory alternatives (Defs. Fdgs. 175-178, 180, 188, 204-205, 207).

[14] Comparable percentages of other companies' activities have been relied upon to determine relevant regional or local markets. *E.g.*, *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y.), affirmed, 259 F. 2d 524 (C.A. 2); *Crown Zellerbach Co.* v. *Federal Trade Commission*, 296 F. 2d 800 (C.A. 9). If the court below be correct in defining the market to include virtually all of defendants' business, a single loan by one of the defendants' banks in New York City would apparently require the inclusion in the statistical analysis of all of the loans of the massive New York City banks.

of $1 billion and $650 million in deposits, the making of $500 million and $400 million in loans, and the administration of $400 million and $2.5 billion in trust funds (see the Statement, *supra*, pp. 5-6; Fdgs. 286, 287, 289, 308-316, 321, 337-345, 348, 355-356, 363-372). The Federal Reserve Board pointed out in its report to the Comptroller of Currency (Ex. G-161, pp. 2-3, 10) that the two consolidating banks are strong competitors "essentially * * * engaged in the same type of business * * *. [T]hey are competing for essentially the same types of business and the same types of customers." The merger would eliminate a substantial amount of "existing and potential competition," and would give the new bank "a dominant position * * * strongly adverse to the preservation of effective competition." The district court agreed that the merger would eliminate substantial and direct competition between the two defendant banks (App. 37a; see Fdgs. 320, 332, 336, 347, 351, 358, 360, 373).

(a). The railroad cases.—The closest analogy, in prior decisions of this Court, to the horizontal merger of direct competitors here presented is found in those cases which considered the validity of railroad mergers under the Sherman Act. Three cases involved mergers of transcontinental railroads (*United States v. Southern Pacific Railroad Co.,* 259 U.S. 214; *United States v. Union Pacific Railroad Co.*, 226 U.S. 61; *Northern Securities Co. v. United States,* 193 U.S. 197), and two involved the merger of railroads serving Pennsylvania's anthracite coal fields (*United States v. Reading Co.,* 253 U.S. 26; *United States v. Lehigh Valley Rail-*

road, 254 U.S. 255). Each merger was struck down on the ground that it eliminated substantial direct competition between the merged companies. As one commentator concluded from these cases: "[T]he unification of control and management of two giant companies doing a substantial proportion of the total business in a field, with a consequent elimination of competition between them, is unlawful notwithstanding that a monopoly is not attained, and notwithstanding further that no predatory methods are employed, and competitors are left unrestrained * * *." Handler, *A Study of the Construction and Enforcement of the Federal Antitrust Laws,* TNEC Monograph No. 38, S. Comm. Print, 76th Cong., 3d Sess., p. 58. In the railroad cases, there was no question but that the merged companies remained subject to vigorous competition by other railroads. In the *Reading* and *Lehigh Valley* cases, for example, the merged companies occupied only one-fifth to one-third of their relatively limited geographical market. See Handler, *supra,* pp. 48-49, 58-59, 66-71. As this Court held in *United States v. Southern Pacific Railroad Co., supra,* 259 U.S. at 230, "Such combinations * * * [are] not the result of normal and natural growth and development" in a competitive economy, and are unreasonable restraints of trade regardless of the continued existence of competition from other firms. Under the authority of these decisions, therefore, the proposed merger in the present case constitutes an unreasonable restraint of trade on the conceded facts.

(*b*). *The Columbia Steel case.*—Even if the proof of the proposed elimination of competition between

the two giant banks were not alone enough to demonstrate a violation of the Sherman Act, the proposed merger is plainly unlawful when judged on the basis of the factors enunciated by this Court in its most recent discussion of the applicability of the antitrust laws to horizontal mergers or acquisitions by competitors, *United States* v. *Columbia Steel Co.*, 334 U.S. 495. The factors to be considered are: dollar volume, although that factor is not "in itself of compelling significance"; "the percentage of business controlled" in the relevant market, the relative effect of which varies "with the setting in which that factor is placed"; "the strength of the remaining competition" both with respect to the competition eliminated between the merged companies and with respect to the competition from other companies; "the probable development of the industry" including the past history of the industry and the relevance of that history for the future development of the industry; and other subsidiary factors (*id.* at 527, 528).

(1). *Dollar volume.*—Although dollar volume is not "in itself of compelling significance" (334 U.S. at 527), it would be substantial in the proposed consolidated bank. The total assets of the consolidated bank would amount to about $1.75 billion; the total deposits would amount to over $1.5 billion; and the total loans would be close to $1 billion (see the Statement, *supra*, pp. 5-6).

(2). *The percentage of the business controlled.*—The proposed consolidation would bring about a marked concentration of commercial banking in the four-

county area. PNB-Girard would have over 35% of all the assets held by commercial banks in the area, over 35% of total deposits, about 35% of total loans, and over 40% of all commercial and industrial loans (see the Statement, *supra*, pp. 6-7 & n. 3, p. 7).

(3). *The strength of the remaining competition.*—In addition to eliminating substantial and direct competition between the two consolidating banks throughout the entire range of their businesses (see *supra*, pp. 19-20), the proposed consolidated bank will alter radically the existing competitive situation among all commercial banks with head offices in the four-county area. Instead of the present situation of two front-running banks of approximately equal size, with smaller competitors of decreasing size, the proposed consolidated bank will be far larger than any of its competitors, being at least 1.5 times the size of its nearest competitor (see the Statement, *supra*, pp. 7-8 & n. 4, p. 8).

The court below glossed over this consequence on the ground that "the vigor of competition" was assured by the continued activities of the other 40 commercial banks in the four-county area.[15] These banks

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[15] On the basis of statistics concerning commercial banking in other cities in which the leading bank had equal or higher market percentages than the proposed PNB-Girard bank, the district court also found that "no dangerously potential concentration will result from this merger" (App. 35a-36a). But the statistics were presented without analysis or proof in the record concerning the amount of banking business in these other markets, the absolute size of the lending banks, the relative size of their competitors, the existence (or not) of a trend to concentration, or other pertinent facts, such as whether the size of the leading bank is attributable to mergers or internal growth. In any event, the possible existence

were erroneously considered equivalent competitive alternatives to PNB-Girard up to their respective lending limits per borrower (App. 39a). Although there are 27 banks which are legally permitted to lend up to $100,000 to any one borrower (Ex. D-15),[16] many of these banks would quickly deplete their lendable funds if they were to make any substantial number of loans at the limit. The lending limit is fixed by law at 10% of capital and surplus; the funds available for lending are derived primarily from deposits, secondarily from capital and surplus (Tr. 2572, 2613-2615). Thus, of the 27 banks with a $100,000 lending limit, only 7 have total outstanding net loans (and lendable funds)[17] in excess of $100,000,000. Fifteen of the 27 banks have total net loans of less than $25,000,000, 9 have less than $10,000,000, and 1 has less than $700,000 (Ex. D-15). The smaller banks cannot be compared in economic power and influence—and as competitors for $100,000 loans—with the merging banks which together have almost $1 billion in outstanding loans (Govt. Prop. Fdg. 408), and cover the

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elsewhere of a high degree of concentration, or even an unprosecuted violation of the antitrust laws, could not justify a merger if shown to be unlawful in the present case.

[16] In the four-county Philadelphia area, as the court noted, there would be after the merger 41 banks with lending limits up to $10,000, 27 up to $100,000, 10 up to $500,000, 7 up to $1,000,000, 4 up to $2,500,000 and the new consolidated bank with a lending limit of $15,000,000 (App. 39a).

[17] Defendant Girard's president testified that commercial banks generally lend no more than about 60% of deposits, a ratio considered consistent with sound banking practice (Tr. 2614). The net loans of the Philadelphia area banks shown on Ex. D-15 are close to this ratio and, therefore, approximate the banks' lending capacities.

four-county area with 65 offices (Fdgs. 8, 293-295, 393; Govt. Prop. Fdg. 402; Tr. 884, 2056). Moreover, although large banks in New York and elsewhere solicit business in Philadelphia and although the proposed merged bank might be able, by reason of its increased size, somewhat to enhance competition for large loans on the regional and national markets,[18] these factors cannot outweigh or ameliorate the chief and overriding effect of the transaction, which is the elimination of competition between the defendants and the undue concentration of commercial banking within the four-county area.[19]

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[18] The record does not support the claim (App. 48a) that defendants must unite to provide adequate service for the benefit of the Philadelphia area. The main aim of the merger is allegedly to provide a higher lending limit; evidently a matter of civic prestige (Tr. 1460, 3189-3190, 3905). The merged bank will be able to lend up to $15,000,000 to any one borrower, in place of PNB's $8,000,000 and Girard's $6,000,000 limits. However, the president of PNB could cite only five borrowers in the Philadelphia area in 1960 who stated that they obtained loans from other cities "due to the inadequate lending limits of Philadelphia National or Girard" (Tr. 1415-1418). As of December 1960, PNB had only two loans outstanding at its present limit; Girard had none (Tr. 1489). PNB had received only five requests in the last five years for loans in excess of its limit, three of which were satisfied by PNB with the cooperation of other banks (Exs. G-146, G-147). Girard had similarly fulfilled its lone request for a line of credit beyond its limit and had experienced no requests for loans of that size (Ex. G-199; Tr. 2842, 3813). And most of defendants' largest customers do not utilize their present lines of credit with defendants (Ex. D-26; Tr. 2854-2878; Ex. D-40; Tr. 2788-2789).

[19] The decision below is hardly supported by the testimony of local bankers that the vigor of competition will continue, or even increase (App. 37a-38a). Some of the witnesses based these conclusory opinions upon the prior experience that after large mergers there is some shift in patronage (Tr. 2314, 2770-2772, 3172-3173, 3274-3275). But this effect offers only a transitory competitive opportunity. To the extent that the bankers expressed their per-

(4). *The probable development of the industry.*—In the present case, the number of competitive units in the market has been marked by a steady decline during the last 15 years, a decline which shows every sign of continuing. The fact cited below (App. 40a), that one commercial bank has been established in the Philadelphia area during this period and has grown to assets of about $15,000,000, deposits of $14,000,000, and loans of $7,500,000 (Ex. D-15), is more than outweighed by the disappearance, between 1947 and 1960, of 66 of 108 independent banks in the area (see the Statement, *supra*, p. 7). The trend towards concentration is clear. The district court plainly erred in refusing to find that there was no real possibility of entry of new competition to replace that which would be eliminated by the merger of defendants.

The unlawful impact of the proposed merger is confirmed by a comparison of the facts in the present case with those of *Columbia Steel*. There, the Court

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sonal intention to compete energetically in the future (Tr. 3050), the testimony is hardly material.

One of the banker witnesses relied upon below (App. 38a) was Albert T. Mason, president of Liberty Real Estate Bank and Trust Co. in Philadelphia, who stated that small banks such as his did not suffer from previous mergers and would not be disadvantaged by the PNB-Girard consolidation (Tr. 3050-3051). Since the judgment below, an application to merge signed by Mr. Mason and others was filed by Liberty and another small bank in the four-county area, Bridgeport National Bank, with the Federal Deposit Insurance Corp. The banks asserted, as a reason for the merger, that "the aggressiveness of the banking industry has intensified competition so that the smaller banks must combine so as to remain effective in their area" (Application, p. 4-A, on file with F.D.I.C.; cf. Fdgs. 437-438).

sustained the acquisition by United States Steel of the assets of the Consolidated Steel Co., the horizontal effect of which was limited to structural steel fabrication, and held that, on the basis of the factors enumerated (see *supra*, p. 22), the acquisition was not an unreasonable restraint of trade.[20] United States Steel had aggregate sales of $1.5 billion and Consolidated Steel had annual sales of structural steel, which was its only product, of only $20 million. The sales with respect to that portion of structural steel fabrication as to which the two companies were in direct competition, however, represented only a small portion of the annual sales figures. (334 U.S. at 500, 528-529.) As to the percentage of business controlled, the government offered evidence to indicate that, within the purported relevant market of eleven western states (see 334 U.S. at 514), "United States Steel could be expected in the future to sell 13% of the total of structural steel products in the Consolidated trade area and that Consolidated could be expected to sell 11%." (*id.* at 529). The combined total would therefore be only 24% of the business controlled in the market. The Court raised serious questions about the validity of these figures, because of the doubtful, speculative nature of the alleged horizontal competition between the two companies with respect to structural steel

[20] The Court's opinion was largely devoted to the questions raised by the alleged effects of the vertical integration which actually motivated the asset acquisition. United States Steel purchased Consolidated's assets as a market for the ingot output of a rolled steel plant at Geneva, Utah, which it had previously acquired from the War Assets Administration; the latter sale had been approved by the Attorney General as not violating the antitrust laws (334 U.S. at 503-507).

fabrication, but made the "doubtful assumption" of their accuracy for purposes of discussion (*ibid.*). Even on the basis of these figures, however, the Court held that there was no unreasonable restraint, in view of "the present unusual conditions of the western steel industry" and its prospective development (*ibid.; see id.* at 512-516, 529). These "unusual conditions" in the industry—which included changes in the industry structure resulting from World War II and a new basic freight rate pattern—tended to indicate an expanding number of market participants and to reduce the significance of previous or existing market positions (334 U.S. at 514, 529-530). The contrast of the factual setting of the present case with that of *Columbia Steel* is obvious and indicates that under the tests this Court has laid down the proposed merger here must be found to create an unreasonable restraint of trade.

3. *The Applicability of Section 7 of the Clayton Act.*

(*a*). *The effect of the merger.*—If the government be correct in its contention that the proposed merger is a combination in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, then the same analysis is sufficient, *a fortiori*, to establish that the effect of the proposed merger may "be substantially to lessen competition" or "to tend to create a monopoly," in violation of Section 7 of the Clayton Act. Moreover, even if a violation of the Sherman Act were not established, the market analysis and the appraisal of the effect of the merger on competition shows that the court below plainly erred in hold-

ing that the proposed merger might not substantially lessen competition or tend to create a monopoly.

Congress clearly intended that a merger or consolidation would violate Section 7 of the Clayton Act well before it could violate the Sherman Act. See S. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4-5. Once a merger eliminates "in whole or in material part * * * the competitive activity of an enterprise which has been a substantial factor in competition" (H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8), a violation of Section 7 occurs, providing the other criteria of the Section are met (see, *e.g., Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (C.A. 9); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.); *United States* v. *Koppers Co.*, 1962 Trade Cases § 70,194 (W.D. Pa.)). Since the proposed merger will eliminate substantial and direct competition between PNB and Girard, a basic criterion for establishing a violation of Section 7 has been satisfied.

(*b*). *The scope of Section 7.*—Another substantial question is raised by the court's refusal to find that the proposed merger in the present case satisfied the other criteria of Section 7. Section 7 prohibits acquisitions of "the whole or any part of the stock or other share capital" or of "the whole or any part of the assets of another corporation," if the acquisitions have the prescribed anticompetitive consequences. Although all inter-corporate mergers or consolidations cannot be described literally in terms of simple acquisitions of stock or assets, the fact is that today there can be no question that Section 7, under either its "stock" or

"assets" clause, covers all types of mergers and consolidations as well as acquisitions. In *United States v. du Pont & Co.*, 353 U.S. 586, 590, this Court, quoting from H. Rep. No. 1191, 81st Cong., 1st Sess., p. 11, pointed out that "the 1950 amendment [to Section 7 adding the "assets" clause] was purposed '. . . to *make it clear* that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal' " (emphasis by the Court. Although the Court in this quotation was concerned with making it clear that even before the 1950 amendment Section 7 had applied to vertical as well as horizontal acquisitions (see 353 U.S. at 590), it is plain that the Court also assumed that Section 7 applied to mergers as well as to acquisitions and therefore that the 1950 amendment had put to rest the dictum in *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission*, 291 U.S. 587, 595, that Section 7 did "not forbid * * * the merger of corporations pursuant to state laws." This previous exclusion of mergers from the coverage of Section 7 was an improperly restricted reading of the reference to acquisitions in Section 7.

In Section 7, the differentiation between the acquisitions of "stock" and "assets" becomes important with respect to bank mergers because only the "stock" acquisition clause is applicable to bank mergers. The "stock" clause applies to acquisitions by "any corporation engaged in commerce," whereas the "assets" clause applies only to acquisitions by corporations "subject to the jurisdiction of the Federal Trade Commission," from which banks are excluded by Section 11 of the Clayton Act, 15 U.S.C. 21 (cf. Section

5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a)).

The court below held that the "acquisition" in the present case was one of "assets" and was therefore outside the scope of Section 7 (App. 17a-21a). But an assets acquisition refers to the typical purchase of property, such as the purchase of Consolidated's assets by United States Steel in *United States* v. *Columbia Steel Co., supra.* A merger or consolidation of going concerns, on the other hand, may be viewed as combining two distinct and successive acquisitions: (1) an acquisition by the newly consolidated company of all of the stock of the merging companies for which stock of the consolidated company is issued; and (2) an acquisition of assets, in which the subsidiaries are absorbed into the parent consolidated company. In the statutory consolidation proposed between PNB and Girard, under the express terms of 12 U.S.C. (Supp. II) 215(e), "[t]he corporate existence of each of the consolidating banks * * * shall be merged into and continued in the consolidated national banking association and such consolidated national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation." Under the agreement of consolidation, PNB and Girard are to be consolidated under the PNB charter, and the consolidated bank is to "be deemed the same corporation as each of the Consolidating Banks * * *." All property rights, franchises and interests of the two banks are to be vested in the consolidated bank, which in turn is to be responsible for all of the liabilities of the two

banks. (See Secs. 1 and 5 of the agreement; the Statement, *supra*, pp. 8-9.) Although, under the Act and agreement of consolidation, the two "acquisitions" of stock and assets occur in a single step, the transaction nevertheless must be broken down into its component elements and analyzed as separate acquisitions for purposes of applying Section 7. A bank merger therefore may be characterized as involving both an acquisition of "assets", which is outside the scope of Section 7, and an acquisition of "stock", which is within the scope of Section 7. Since a vital element of the bank merger would be an acquisition of stock, the proposed merger is clearly within the scope of Section 7.

Under the original Section 7 (which covered only stock acquisitions), this Court held in *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission*, *supra*, that, if an illegal acquisition of stock were followed by a merger of assets, the Commission would no longer have power to grant relief. The holding of the case, however, rested explicitly upon the statutory limitations applicable to the Commission (see 291 U.S. at 598-599). *Arrow-Hart* would hardly have relevance in the present case, for the powers of a court of equity are not circumscribed as are the powers of the Federal Trade Commission. Indeed, the Court in *Arrow-Hart* itself stated (291 U.S. at 599) that "if any remedy for such violation is afforded, a court and not the Federal Trade Commission is the appropriate forum." See the dissenting opinion of Mr. Justice Stone in *Arrow-Hart*, 291 U.S. at 608; *Northern Securities Co.* v. *United States*, 193 U.S. 197, 356-358. *Arrow-Hart* thus does not stand in the way of the district court granting

effective relief against the proposed merger in the present case.[21]

CONCLUSION

For the foregoing reasons, the questions presented by this appeal are substantial and of public importance in the enforcement of the antitrust laws. Probable jurisdiction should be noted.

Respectfully submitted,

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MARCH 1962.

[21] Even if the merger were not directly subject to Section 7 the Section nevertheless has relevance to this case. The Court has stated that the policy of Section 7 illuminates the Sherman Act and should be taken into consideration in a Sherman Act case. *United States* v. *Columbia Steel Co., supra*, 334 U.S. at 507, fn. 7; *Times-Picayune* v. *United States*, 345 U.S. 594, 610-611. The Sherman Act's standard of proof has been said to be "more stringent" in the case of tying agreements (*Times-Picayune, supra*). For mergers, however, the Court has noted only that the Sherman Act standard "differs somewhat from the specific language" of the Clayton Act (*Columbia Steel, supra*, 334 U.S. at 522, n. 19). At the least, therefore, mergers of substantial competitors should not be favored by the Sherman Act over loose combinations or agreements.

APPENDIX

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 29287

United States of America, plaintiff,

v.

The Philadelphia National Bank and Girard Trust Corn Exchange Bank, defendants

* * * * *

Opinion

Clary, Ch. J. January 15, 1962.

This is a civil action instituted under Section 4 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. Section 4, (commonly known and hereinafter referred to as the "Sherman Antitrust Act"), and Section 15 of the Act of Congress of October 15, 1914, as amended, 15 U.S.C. Section 25, (commonly referred to and hereinafter designated as the "Clayton Antitrust Act"), in which the United States (hereinafter referred to as "government" or "plaintiff") seeks an injunction to restrain the defendants, The Philadelphia National Bank (hereinafter referred to as "PNB") and Girard Trust Corn Exchange Bank (hereinafter referred to as "Girard"), from carrying out an agreement of consolidation. This agreement of consolidation was drawn up after the passage of Public Law 86-463, (commonly referred to as "The Bank Merger Act of 1960"), amending 74 Stat. 129; approved May

13, 1960, found at 12 U.S.C. Section 1828(c), and is subject to the provisions thereof. Plaintiff herein alleges that the proposed consolidation violates Section 1 of the Sherman Antitrust Act, as amended, 15 U.S.C. Section 1, and Section 7 of the Clayton Antitrust Act, as further amended by the Act of Congress of December 29, 1950, 15 U.S.C. Section 18, (commonly known as "The Celler-Kefauver Anti-Merger Act").

The proposed merger sought to be enjoined was approved by the Directors of the banks involved on November 15, 1960, and by the Comptroller of the Currency on February 24, 1961. This action was instituted on February 25, 1961.

Generally, the complaint alleges that commercial banking and several of its integral parts comprise interstate commerce; that commercial banking with its integral parts fills an essential and unique role in the nation's economy with a combination of services unduplicated by other financial institutions; that existing and potential competition in commercial banking in the Philadelphia area would be substantially and unreasonably lessened; that the merger would substantially and unreasonably increase concentration in banking in the Philadelphia area and that existing and potential competition in the commerce and industry served by commercial banks in the Philadelphia area would be substantially and unreasonably lessened. Parenthetically it may be noted at the outset that the last of these averments has not been seriously presented by the plaintiff and, for all practical purposes, has been abandoned.

The net effect of the above, the plaintiff contends, is a violation of both Section 1 of the Sherman Act and Section 7 of the Clayton Act. The plaintiff contends further that competition in commercial banking is absolutely vital and necessary to the preservation of the

financial structure and security of the nation: that undue concentration of banking powers would have the effect of increasing costs and interest rates both to depositors and borrowers; would result in a decrease in the credit facilities available to the general public and, in effect, would destroy the very foundation of the banking system of the United States which, according to the Government's witnesses, rests entirely upon a number of independently-owned banks serving the community, which system they felt strengthened competition, and a merger such as this would tend to destroy it.

Initially, it would help to review, in extremely brief outline, what Congress has done in this field. The Sherman Act, supra, enacted in 1890, was designed to prevent combinations in restraint of trade or commerce among the several states or with foreign nations. That this was an exposition of the common law doctrine is revealed by the decision in *United States v. American Tobacco Company*, 221 U. S. 106 (1911) at pages 179-180 where the Supreme Court of the United States declared:

> "'Applying the rule of reason to the construction of the statue, it was held in the Standard Oil Case that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have

> but a like significance . . . the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect."

Citing Standard Oil Co. v. U.S. 221 U. S. 1 (1911)

It will therefore be seen that the Supreme Court judged the key factor and purpose of the Sherman Antitrust law to be the perpetuation of and protection of free competition. An examination of both the Clayton Act and the Federal Trade Commission Act, both passed in the year 1914, and the case law decided thereunder, again stresses the principle of law that competition should be encouraged as a national policy, and it is the destruction of this free competition which is proscribed.

The Miller-Tydings Amendment to the Clayton Act and the Robinson-Patman Amendment were both designed to insure free and fair competition. The Celler-Kefauver Amendment of 1950 was designed to prevent asset acquisitions thereby plugging a loophole in the Clayton Act which previously prevented stock acquisition only, and did not cover the area in which asset acquisitions might tend to destroy competition. The legislative history of this latter Act clearly indicates the intent of the Congress to preserve competition as defined by the Supreme Court.

Since competition and the preservation of competition permeates each of the aforementioned Acts and is the common bond between each of them, it would appear that 71 years after the passage of the first Antitrust law, the Court should have (but does not) a clear legal defi-

nition of competition as used in each of the Acts. Congress has given the Court at least one idea of what it means in the use of the word when it refers to "vigorous" competition. What then is the real definition of competition and what are the standards of competition required by these Acts? The Webster definition reads as follows:

> "Com. & Econ. The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms; also, the relations between different buyers or different sellers which result from this effort."

In *United States* v. *Aluminum Company of America*, 91 Fed. Supp. 333, at 355 (S.D. N.Y. 1950), Chief Judge Knox defined competition as follows:

> "Commercial competition, theoretically, is the independent endeavor of two or more persons or organizations within the realm of a chosen market place, to obtain the business patronage of others by means of various appeals, including the offer of more attractive terms or superior merchandise."

It seems to the Court that the Congress, by the use of the word "competition", intended to preserve free and open markets wherein the rivalry of the commercial firms, in the same line of endeavor, for the patronage of the common customer, would be demonstrated by a business atmosphere where free purchasers and free sellers, under no obligation to buy, and under no obligation to sell, would enter into contracts of purchase and sales (or service contracts) because of the actual inducements offered, such as quality of product, terms, delivery, and the many other factors which make for good business relations, having in mind the peculiar

situations, facts and circumstances which govern the particular transactions between individuals or organizations.

It is also apparent that in any antitrust action, including the instant one, a Judge called upon to decide the case must, of necessity, take the facts that are presented to him and determine on those peculiar facts whether the particular circumstances involved will, or will not, destroy the free competition which the Congress intended to preserve, and with particular scrutiny of the industry or part thereof charged with violations.

The Government here has brought an action—the first of its kind—to prevent the merger of two strong Philadelphia banks, and on the ground that this merger will (1) violate the Sherman Act by restraining trade, and (2) violate the Clayton Act by lessening and/or destroying competition and tending toward a monopoly. The Court believes that the Government's general theory of the case should be set out in brief, broad outline before coming to the specifics.

The Government's case was predicated upon the premise that the banks involved were legally restricted to having offices in geographic limits. Starting with that assumption, the Government introduced a wealth of statistical data, the accuracy of which has not been questioned, which would show that a very large percentage of the deposits and loans originated in the restricted geographical area. Based strictly upon this premise, and applying the principles heretofore enunciated in industrial cases, the Government argues that these percentages are all persuasive, show a high degree of concentration of the market involved, and that it is therefore the duty of the Court to prevent this clear, apparent restraint of trade, destruction of,

or restriction of competition, and tendency to monopoly by prohibiting the merger.

The Court accepts the statistics introduced as showing exactly what they demonstrate on the figures used, but, as will be pointed out later when discussing the specifics, refuses to accept the conclusions which the Government asks the Court to draw.

In support of its contention that this merger is illegal, the Government attempted to show by the testimony of two university professors that the merger would have a profound adverse effect upon the banking system of this area, actually restrict credit, and permit price fixing for banking services. This attempt was far from successful. The professors had individual theories of the effect of the merger on the monetary system of the United States and of this area, which were completely destroyed on cross-examination, particularly as relating to the Philadelphia situation. The Government also attempted to establish, by opinion testimony of small town bankers, that the contemplated merger would adversely affect not only the banking situation in Philadelphia, but generally throughout the country, including their own small towns. Their testimony was practically a rehash of the testimony they gave before both the House and Senate Committees considering the Bank Merger Act of 1960. There they strongly urged the Congress of the United States to forbid further bank mergers and to maintain the status quo of the banking system of the United States. They attempted to have Congress limit prospective mergers to the very narrow situations where economic necessity would make a merger absolutely imperative. For example, they conceded that where a bank was on the verge of insolvency, a merger should be permitted with a strong solvent bank for the protection

of depositors and the general public. They also agreed that where ineffectual management was demonstrated, again it would be in the public interest to merge the bank with a strong progressive bank, again for protection of depositors and the public. With these two and other minor exceptions, not necessary to outline here, they fought vigorously to have the Congress absolutely forbid all other mergers. This the Congress refused to do, and, in the opinion of this Court, properly so.

Commercial banking, despite the attempt of the Government in this case to have the Court consider it an ordinary line of commercial endeavor, comparable to the ordinary industrial organizations, is a specialized branch of what the Court chooses to term the financial industry. It is completely regulated. It may not, as an industrial plant might, establish a branch of operations where it pleases. By virtue of both state and federal authority, it must keep its assets liquid, as will be hereinafter discussed. It may charge for its principal services (lending of money) a maximum prescribed by law. It may not pay interest on demand deposits and is limited by law to the amounts which it may pay for savings or time deposits. It may not go out and buy raw materials and manufacture products and attempt to extend its market. Its stock in trade is money and the only way that it can generate its stock in trade—money—is to create demand deposits which it may lend to individuals, corporations or organizations. It is the commercial bank, even though strictly regulated, which comprises the backbone of the montetary system of the United States. To place it in and consider it as part of the commercial and industrial field, as contrasted with the financial, would be to ignore the realities of the situation.

Both the Government and the defendants have, in

support of their respective contentions, cited the only antitrust case law available and all such cases were decided under the Sherman and subsequent Acts. All involve only commercial and industrial organizations. While the Court recognizes the validity of the broad principles of law therein enunciated, it certainly does not follow that those principles should be applied with the same force and effect to a regulated industry as to one in the so-called "free enterprise" field. The Congress of the United States has, in fact, in the industrial and commercial field, usually exempted regulated industries from the application of the antitrust law and in the public interest.

It is significant to note that in the Bank Merger Act, the Congress of the United States has included as one of the controlling elements, and an important one, for consideration in the determination of Governmental approval of bank mergers, that same public interest. This Court does not believe, as the Government would have it, that this was a mere passing reference without practical significance and actually completely irrelevant to a decision of this case, but, on the contrary, feels that the inclusion of this public interest concept is an important element in the Congressional approach to monetary regulation.

The only question involved in this case is—Will this proposed merger of two Philadelphia banks, in the City and County of Philadelphia, Commonwealth of Pennsylvania, substantially lessen competition, tend toward monopoly, and/or restrain trade and commerce, in violation of the Clayton and Sherman Acts?

Coming now to the specifics of this case and expanding upon the allegations of the complaint, it avers, inter alia, that commercial banks fill an essential and unique role in the nation's economy with a combination of services unduplicated by other financial institutions;

that commercial banking in Philadelphia and the surrounding metropolitan area is heavily concentrated in a few banks; that PNB and Girard compete with each other, and with other banks in the Philadelphia area, in the performance of commercial banking functions; that as of June 30, 1960, PNB accounted for approximately 22% and Girard for approximately 15% of the total deposits in Philadelphia commercial banks; and, that as a result of the proposed merger PNB would become the largest commercial bank in the Philadelphia area and would be approximately 50% larger than its closest competitor.

Further, it is charged that defendants have been engaged in an unlawful combination in unreasonable restraint of trade and commerce in commercial banking in violation of Section 1 of the Sherman Act, and that the effect of the merger may be substantially to lessen competition, or tend to create a monopoly in violation of Section 7 of the Clayton Act.

PNB is a banking association, engaged in interstate commerce, organized under the laws of the United States, having its principal place of business at Philadelphia, Pennsylvania. Girard is a banking association, engaged in interstate commerce, organized under the laws of the Commonwealth of Pennsylvania, having its principal place of business at Philadelphia, Pennsylvania.

On November 15, 1960 the Boards of Directors of PNB and Girard approved a proposed merger of the two banks. On the same day, an application for approval of the merger was filed with the Comptroller of the Currency in accordance with the provisions of the 1960 amendment to the Federal Deposit Insurance Corporation Act, 12 U.S.C. Section 1828(c), commonly known as the Bank Merger Act.

On December 20, 1960, the two Boards approved a

written agreement of consolidation to be effected in accordance with the provisions of the national banking statutes, 12 U.S.C. Section 215. On February 24, 1961, the Comptroller of the Currency approved the proposed merger. He did so despite the fact that in the reports submitted to the Comptroller by the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Attorney General, as was required by the Bank Merger Act, both the Attorney General and the Federal Reserve Board concluded that the merger would result in a substantial lessening of competition and a tendency toward monopoly, and the Federal Deposit Insurance Corporation concluded that the merger would be adverse as to Philadelphia and the immediate suburbs, but not adverse in the regional, national, and international fields of competition.

The next day the Department of Justice filed the complaint in this action. On May 9, 1961, meetings of the shareholders of the two banks were held and the agreement of consolidation was approved. The trial of this case began on June 5, 1961, without a jury, and was concluded on August 3, 1961.

PNB was chartered on October 20, 1864 under an Act of Congress of June 3, 1864. In 1926 it merged with Girard National Bank, and in 1928 it merged with Franklin-Fourth Street National Bank. Until 1951 PNB engaged in what has been termed a "wholesale" banking business, at which time it was decided to enter the "retail" banking and trust fields. Since 1951 PNB has acquired 9 additional banks. As of March 10, 1961, PNB conducted a general commercial banking business through 27 offices, 10 of which are located in Philadelphia County, 5 in Delaware County, 5 in Bucks County, and 7 in Montgomery County. As of June 30, 1960, PNB had total assets of $1,064,335,000, total deposits of $924,495,000, and total loans of $523,612,316 of

which approximately 57% in dollar amount were in commercial and industrial loans.

Girard was chartered as a state bank on March 17, 1836 by the Pennsylvania legislature. It was primarily engaged in the trust business and accompanying banking services until 1940 at which time efforts were begun to develop commercial business and consumer credit loans. Until 1950 Girard had only one office. In the past 10 years it has engaged in 6 mergers. Girard now conducts a general commercial banking business through 39 offices, of which 21 are located in Philadelphia, 12 in Delaware County, and 6 in Montgomery County. As of June 30, 1960 Girard had total net assets of $740,920,000, total net deposits of $650,790,000 and total net loans of $399,362,000, of which approximately 49% in dollar amount were in the commercial and industrial category.

With this brief introduction it now becomes necessary, before discussing in detail the factual questions presented and the law applicable thereto, to decide two purely legal questions which have been raised, one relating to the Bank Merger Act, the other to the applicability of the Clayton Act to this action.

Bank Merger Act of 1960

The defendants contend that the approval of the merger by the Comptroller of the Currency is the final and exclusive determination of its legality and that the Bank Merger Act of 1960 precludes a review of the proposed merger under the antitrust laws. 12 U.S.C. Section 1828(c) reads in relevant part:

> "No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured

> bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank. . . . In granting or withholding consent under this subsection, the Comptroller, . . . shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest."

Defendants claim that the above statute makes it clear that it was the intent of Congress that the Comptroller test the validity of bank mergers by a *public interest* standard which is broader than and essentially different from an exclusively antitrust standard. Since Congress decided to apply antitrust policies to such mergers only to the limited and subordinate extent of being a single factor for consideration, it is argued, it must follow that the practical implementation of this congressional decision necessarily precludes an antitrust action to prevent a merger which has been approved by the executive agency charged with applying the public interest standard in determining whether approval should be given.

In support of this argument, it is submitted that the legislative history of the Bank Merger Act (herein-

after referred to as the "Act"), emphasizes the fact that the competitive factors are not to be controlling in the public interest determination to be made by the Comptroller. For example, at page 24 of the *Senate Report, Senate Report No. 196,* 86th Cong., 1st Sess. on S. 1062 (1959), the following statement appears:

> "Under S. 1062 the competitive factors involved in the merger are only one element of several to be considered in passing on the application. The committee wants to make crystal clear its intention that the various banking factors in any particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision."

And, in the House Report at pages 9 and 10, *House Report No. 1416,* 86th Cong. 2d Sess., (1960), this statements appears:

> "Because banking is a licensed and strictly supervised industry that offers problems acutely different from other types of business, the bill vests the ultimate authority to pass on mergers in the Federal bank supervisory agencies, which have a thorough knowledge of the banks, their personnel, and their types of business."

It is true that one can find statements in the legislative history of the Act which, when read alone, indicate that Congress intended to preclude the application of the antitrust laws to bank mergers. It is most difficult, however, to accept defendants' contention when faced with unequivocal statements to the contrary in the reports of both the Senate and the House. This statement appears at page 9 of the House Report:

"S. 1062 would not in any way affect the applicability of the Sherman Act or the Clayton Act to bank mergers."

And, at page 3 of the Senate Report:

"S. 1062 would not affect in any way the applicability of the Sherman Act to bank mergers and consolidations."

These statements cannot possibly be reconciled with defendants' interpretation of the legislative intent of Congress.

In support of their position, the defendants place a great deal of weight on the *public interest*, as opposed to the antitrust standard written into the Act. Why, they ask, would Congress arm the Comptroller with such a comprehensive standard if it intended that the Department of Justice could supersede his determination by a mere showing of anticompetitive effects? This argument of the defendants, while persuasive, does not convince the Court that it should enunciate the rule of law requested that public interest is the controlling factor in any particular merger. There is no doubt that the public interest factor, while not controlling, does, in this type of antitrust litigation, play more than a casual or secondary role, particularly where it involves a highly regulated field. The Court cannot conclude that merely because a public interest standard was written in the statute as one of the factors to be considered, that a Court is rendered incompetent to review the action of the individual or department charged with the administration of the Act. Had Congress so intended, it certainly would have been specifically set out and in plain terms in the language of the statute. The Court does not find that intendment here.

Defendants also press the argument on another

ground as well. They say that Congress intended to exclude the antitrust laws because the Act contains no provision such as is found in Section 11 of the Bank Holding Company Act of 1956, 12 U.S.C. Section 1841 et seq., which explicitly preserves the application of the antitrust laws to the subject matter of the statute. It is pointed out that Congressman Celler proposed specific language for such an amendment in the House hearings on the bill, but nevertheless it was not included in the amendment by the House of Senate 1062 as previously passed by the Senate. The following statement, however, clearly indicates that Congressman Celler did not consider that the antitrust laws would be excluded by the failure to insert such a provision:

> "While such a provision would not add to the bill from a substantive standpoint, it would avoid needless controversy and possible litigation involving the contention that the strictness of the Sherman and Clayton Acts had been nullified by the provisions of the pending bill." Hearings before the Subcommittee No. 2 of the Committee on Banking and Currency, H.R., 86th Cong., 2d Sess. on S. 1062 (1960), pages 131 and 132.

Moreover, the Court finds the antithetical argument proffered by the plaintiff equally, if not more persuasive, than that of the defendants. The Government argues that a creation of an exemption from the antitrust laws requires clear and explicit language in the exempting statute such as is found in Section 5 (11) of the Interstate Commerce Act, 49 U.S.C. Section 5(11).

In light of this difference of opinion, the Court is constrained to return to the statements made in both the Senate and House reports concerning the applicability of the Clayton and Sherman Acts. It is the opinion of

this Court that defendants have failed in their attempt to nullify the plain meaning of these words. They are much too explicit to be ignored or explained away.

Applicability of Section 7 of Clayton Act

The Celler-Kefauver Anti-Merger Act, 15 U.S.C. Section 18, reads in relevant part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Celler-Kefauver amendment was enacted in 1950 as the original Section 7 proved ineffective in preventing mergers, primarily because of the failure of the statute to include asset as well as stock acquisitions. Because banks are exempted from the jurisdiction of the Federal Trade Commission, under the provisions of the Federal Trade Commission Act, 15 U.S.C. Section 45(a), the Celler-Kefauver amendment can only apply if the bank merger is consummated through a stock acquisition. Therefore, if the Clayton Act is to apply at all to the merger presently under consideration, the plaintiff must show that the proposed consolidation of the defendants involves a stock acquisition.

Before considering the argument advanced by the plaintiff with respect to this question, it is necessary, so that the transaction can be placed in the proper perspective, to set forth certain pertinent provisions

of the agreement of consolidation entered into by the defendant banks:

Section 1

"Girard and Philadelphia National (the 'Consolidating Banks') shall be consolidated pursuant to the provisions of the aforesaid statute,[1] under the charter of the Philadelphia National Bank, which shall continue after the effective date of the consolidation as defined below."

Section 5

"The corporate existence of Girard shall be merged into and continued in Philadelphia National, which shall continue in existence as the Association, and the Association shall be deemed to be the same corporation as each of the Consolidating Banks. All rights, franchises, and interests of each bank in, and to every type of property and choses in action, including those held by it as fiduciary, as they exist at the Effective Date shall be vested in the Association without any conveyance or transfer; and the Association shall be responsible for all of the liabilities of every kind and description, including liabilities arising out of the operation of the Trust Department, of each bank existing as of the Effective Date."

"Girard shall contribute to the Association acceptable assets having a book value, over and above its liability to its creditors, of at least $74,059,392 . . ."

"At the Effective Date Philadelphia National shall have on hand acceptable assets having a book value, over and above its liability to its creditors, of at least $93,306,684 . . ."

[1] 12 U.S.C. Section 215.

Section 6

"Upon the statutory consolidation becoming effective: . . . (i) each holder of an outstanding certificate representing shares of Philadelphia National stock shall retain his certificate, which shall automatically remain a certificate representing shares of stock in the Association, . . . and (ii) each holder of an outstanding certificate representing shares of Girard stock shall surrender the same to the Association promptly after the Effective Date and receive in exchange therefor certificates representing the full number of whole shares of stock in the Association to which such shares of stock in Girard shall have been converted; . . ."

The plaintiff contends that under the provisions of Section 6 of the agreement, PNB shall acquire shares of Girard stock which shall be converted into shares of stock in the Association. It is argued that as a result of the merger, the Girard shareholders would give up certain rights (e. g., the right to have a voice in its management, the right to share in its profits, and the right to receive and divide its total capital less debt upon liquidation) to PNB and receive in exchange an equitable ownership in the very different property of PNB. From this it is concluded that the merger would be accomplished by a stock acquisition on the part of PNB in violation of the Celler-Kefauver amendment to Section 7 of the Clayton Act. The Court cannot agree with the plaintiff's conclusion that the transaction here involved is a stock acquisition falling within the scope of the statute.

Plaintiff has misinterpreted the terms of the agreement. Under the provisions of Section 5, the corporate existence of Girard is being merged with that of PNB

to form an Association, each bank contributing all its assets. It is true that the Association being created will continue under the national bank charter already held by PNB. However, this in no way alters the fact that the corporate character of PNB, as it is today, will cease to exist. PNB might be designated the "surviving bank" but it nevertheless survives as a vastly different entity. PNB is acquiring nothing. Rather, the two banks are creating a national banking association by the consolidation of their assets. Section 6 merely outlines the procedures to be followed with respect to the shareholder's evidence of ownership in the Association once the consolidation becomes a reality. The Association itself is exchanging the certificates representing shares of Girard stock for certificates representing shares of stock in the Association. The entire transaction is patterned in conformity with the applicable federal statute relating to bank consolidations and mergers of assets. The fact that certificates representing shares of stock are exchanged for new ones is merely incidental to the transaction, and in no way affects or alters its character.

As defendants point up in their brief, the proposed merger differs from a stock acquisition in several ways under the provisions of the applicable federal statute. 12 U.S.C. Section 215, which must be adhered to in carrying out the consolidation, provides that it may be effected upon the affirmative vote of at least two-thirds of the capital stock outstanding. In a stock acquisition, there would be no power in Girard, or any group of shareholders, to compel any shareholder to sell his stock. Subsections (b), (c) and (d) of Section 215 provide for the right of a dissenting shareholder to receive the appraised value of his shares in cash; he would not have any comparable

right in an acquisition of stock. Subsection (e) of the same statute provides that all of the assets of the individual banks "shall be transferred to and vested in the consolidated national banking association by virtue of the consolidation without any deed or other transfer," which again differs from the procedure with respect to an acquisition of stock.

Moreover, the House Committee on Banking and Currency, when reporting on the Bank Merger Act of 1960, recognized the very problem with which we are confronted here:

> "Section 7 of the Clayton Act prohibits acquisitions of bank stock 'where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monoply.' Because Section 7 is limited, insofar as banks are concerned, to cas s where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the act offers 'little help' in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers." House Report No. 1416, 86th Cong., 2d Sess., (1960), p. 9.

This Court is of the opinion that the Celler-Kefauver Anti-Merger Act of 1950 does not apply to a bank merger of this nature. Any extension of the statute is a function peculiar to the Congress of the United States.

However, it should be noted here that because it is essential to the parties that a final determination of this matter be reached in as short a period of time as is possible, this Court will proceed on the assumption that the Clayton Act is applicable in all respects.

Commercial Banking

Before discussing the questions involved with respect to the Clayton and Sherman Acts, it is necessary to point up the principal characteristics and functions of a commercial bank.

A "commercial bank," as distinguished from other bank and non-bank financial institutions, is an institution authorized to receive both demand and time deposits, to make loans of various types, to engage in trust services and other fiduciary functions, to issue letters of credit, to accept and pay drafts, to rent safety deposit boxes, and to engage in many similar activities. Commercial banks are the only institutions authorized to receive demand deposits. "Demand deposits" are funds accepted by a bank which are subject to immediate withdrawal. They represent the largest element in the money supply of the United States. No interest is paid on demand deposits, as is the case with time and savings deposits.

Commercial banks offer a wider variety of services than any other financial institution. They have been termed the "department stores of finance." Some of their major functions include the receiving of demand deposits, the lending of funds to individuals, partnerships and corporations, the receiving and administering of time and savings deposits, and the performance of personal trust services.

Because commercial banks are the principal reservoir of other people's money, they are regulated to a relatively high degree. Aside from state banking authorities, they may be subject to the jurisdiction of the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Comptroller of the Currency. This governmental regulation necessarily limits to an extreme degree the scope and character of competition among commercial banks.

Demand deposits held by commercial banks account for approximately 80% of the money supply of the United States. For the commercial banking system as a whole, two-thirds of total deposits are demand in nature. In June of 1960, more than 83% of the total deposits of PNB and Girard combined were in the form of demand deposits.

In addition to demand deposits, the area of commercial and industrial loans is one in which great emphasis is placed. Because of this concentration in demand deposits on the part of commercial banks, these commercial and industrial loans are necessarily short term in nature. As has been pointed out previously, PNB, as of June 30, 1960, had approximately 57% in dollar amount of its total loans in the commercial and industrial area, and Girard had approximately 49% in dollar amount of its loans in this same category.

Small and medium size borrowers rely to a great extent on commercial banks to meet their financial needs. In fact, a substantial proportion of loans made in the United States are made to smaller size businesses. In 1955, for example, out of a total of 1,103,000 loans made by member banks of the Federal Reserve, 918,000 were made to businesses with total assets under $250,000. It was testified at the trial of this case that a Philadelphia businessman would find it very difficult to procure an unsecured, short-term loan from any source other than a commercial bank.

Commercial banks are restricted in the nature, amount, volume and purpose of loans they are permitted to make. All national banks and banks chartered in Pennsylvania and most other states are, in general, not permitted to have outstanding loans to any one customer in an amount in excess of 10% of their capital and surplus. This is what is known as the "lending limit." In addition, those commercial banks

which are members of the Federal Reserve must maintain on deposit with the Federal Reserve Bank, or in currency in their own bank, reserves equal to 16.5% of their total demand deposits if they are located in certain areas (including Philadelphia), and 12% if they are so-called country banks. The principal factors in competition among commercial banks are convenience, quality of service, personal relationships, and the capacity to meet the requirements of the customer. The foregoing remarks are not intended to present a comprehensive analysis of commercial banking but all bear on the problem of whether or not the proposed merger violates the statutes.

The initial problem in litigation of this nature, in either a Sherman Act or Clayton Act case, involves a determination of the relevant market within which the defendants compete. *United States v. duPont & Co.*, 353 U. S. 586 (1957); *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948). To find this area of effective competition, the plaintiff must establish a product market (line of commerce) and a geographic market (section of the country).

The Product Market

The Plaintiff contends that the appropriate lines of commerce in which to gauge the effects of this proposed merger under Section 7 of the Clayton Act are the following: Commercial banking, commercial and industrial loans, installment lending to individuals, single payment loans to individuals, real estate loans, personal trusts, time deposits of partnerships and corporations, time and savings deposits, demand deposits, and IPC (Individual, Partnership and Corporation) demand deposits.

At the outset, the Court is confronted with the problem of deciding which test to apply in determining the

appropriate line or lines of commerce. The plaintiff contends that the relevant legal standard for delineating the lines of commerce in which a merger may substantially lessen competition or tend to create a monopoly is whether the products (services) "have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all others . . ." This was the test applied in *United States v. E. I. duPont deNemours,* 353 U. S. 586, pp. 593-4 (1957). The plaintiff argues that the record in this case shows that the general services, as well as certain specialized services, of commercial banks are either not supplied at all or at best supplied only peripherally and imperfectly by other sources.

The defendants suggest another test. They claim that the proper legal standard to be applied in defining the product market is to determine whether the products are "reasonably interchangeable for the purposes for which (they) are produced—price, use and qualities conisdered." The Supreme Court utilized this test in the so-called *Cellophane* case. *United States v. E. I. duPont deNemours,* 351 U. S. 377, 404 (1956). Defendants contend that commercial banking in its ent· ety is not a product line. Rather, they submit it is a business which has two major subdivisions—the acceptance of deposits in which the bank is the debtor, and the making of loans in which the bank is the creditor. Both of these major divisions are further divided by distinct types of deposits and loans. As to many of these functions, there are different types of customers, different market areas, and, most importantly, different types of competitors and competition. With the possible exception of demand deposits, there is an identical or effective substitute for each one of the services which a commercial bank offers. From this the Court is to conclude that because the services offered by other

financial institutions are reasonably interchangeable with those offered by commercial banks, the separate lines of commerce suggested by the plaintiff cannot be limited merely to commercial banks, but must include in each and every case the services of other financial institutions as well.

Despite the fact that the rule suggested by the plaintiff was enunciated in litigation involving the Clayton Act, while the other was formulated in a Sherman Act case, and recognizing that the parties here imply that the standards are not consistent, it is nevertheless the opinion of this Court that they are nothing more than expressions of the same rule in different language. As Judge Herlands stated in *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, pp. 183-4 (S.D.N.Y. 1960).

> "To determine whether or not there is a reasonable probability of a substantial lessening of competition, Section 7 of the Clayton Act demands an examination into economic realities. All competition must be considered, including competition faced by the product in question from other products.
>
> "The tests enunciated by the authorities are consistent. Effectively, the test 'reasonable interchangeability for the purposes for which (the products) are produced—price, use and qualities considered', and the test 'sufficient peculiar characteristics and uses to constitute them products sufficiently distinct . . . to make them a line of commerce within the meaning of the Clayton Act' are but different verbalizations of the same criterion.
>
> "They require the same accumulation and scrutiny of facts and application of judgment. The task is to find the area of effective competition.

The "characteristics and uses" formulation does not limit the court's inquiry to physical attributes and foreclose inquiry into the competitive situation."

For example, applying this reasoning to the instant case, if a commercial bank has sufficient peculiar characteristics and uses to constitute it sufficiently distinct from all other financial institutions, then a commercial bank cannot reasonably be interchanged with other financial institutions by the individual or business firm. Conversely, if a commercial bank can reasonably be interchanged, then its characteristics and uses must not have those sufficient peculiar characteristics and uses necessary to constitute it sufficiently distinct from other financial institutions.

In attempting to justify its choice of "lines," the plaintiff has endeavored to describe the uniqueness of each one. The defendants have challenged this approach by showing that many other institutions offer very similar services. Thus, plaintiff asserts that only a commercial bank makes unsecured, short-term commercial and industrial loans, while the defendants argue that insurance companies, factors and finance companies make commercial and industrial loans.

Defendants attack the suggested line "installment loans to individuals" on the ground that mutual savings banks, savings and loan associations, credit unions, finance companies, as well as other institutions, all engage in installment lending. Therefore, they argue, it is impossible to gauge the effect that the merger would have without knowing not only the percentage figures for PNB and Girard but also the percentage figures for all these other institutions. This reasoning is used in denouncing almost all of the suggested lines.

It is argued that insurance companies are in direct

competition with commercial banks in the making of single payment loans to individuals. And, PNB and Girard contend that several other institutions make real estate loans; that individuals are in direct competition with commercial banks in the personal trust field; that time deposits of partnerships and corporations face competition from many alternatives, including United States Government obligations, commercial paper, tax-free securities, and banker's acceptances; that savings deposits are not an appropriate line because many other institutions receive savings funds.

Finally, plaintiff claims that demand deposits and IPC demand deposits are a separate product line because only commercial banks are authorized to receive them.

It seems quite apparent that both plaintiff's and defendants' positions have some merit. However, it is not the intention of this Court to subdivide a commercial bank into certain selected services and functions. An approach such as this, carried to the logical extreme, would result in many additional so-called lines of commerce. It is the conglomeration of all the various services and functions that sets the commercial bank off from other financial institutions. Each item is an integral part of the whole, almost every one of which is dependent upon and would not exist but for the other. The Court can perceive no useful purpose here in going any further than designating commercial banking a separate and distinct line of commerce within the meaning of the statute. It is undoubtedly true that some services of a commercial bank overlap, to some degree, with those of certain other institutions. Nevertheless, the Court feels quite confident in holding that commercial banking, viewed collectively, has sufficient peculiar characteristics which negate reasonable interchangeability.

Section of the Country

The plaintiff contends that the relevant geographic area for each line of commerce in which to gauge the impact of the proposed merger on competition is the four-county area (Philadelphia, Montgomery, Bucks and Delaware Counties). Under Pennsylvania banking laws, commercial banks may open offices in the political community where their main office is situated, in some other political community within their home county, or in any county contiguous to the county in which the main office is located. At the present time, PNB has offices in Philadelphia and the three contiguous counties of Bucks, Montgomery and Delaware. Girard has offices in Philadelphia, Montgomery and Delaware counties. Plaintiff submits that the phrase "section of the country" in Section 7 must be determined with respect to buyers and sellers. Recognizing that it is as unlikely that any given group of sellers would have all their sales within any specific area, as it is that potential customers in such an area would buy from them to the exclusion of all others, plaintiff argues that the antitrust laws are satisfied if buyers and sellers in a distinguishable area are significantly limited to that area.

The defendants suggest that the plaintiff has proposed the four-county area in order to inflate the percentage figures. They contend that a relevant geographic market for banking services must take into consideration not only the location of the bank and the location of its customers, but also the different types of customers and the location of alternative choices available to them.

Plaintiff has presented a multitude of statistical information showing the source of the defendants' business which the Court will not reiterate here. A few examples should be sufficient. As of September, 1960,

combining the figures for the two banks, commercial and industrial loans outstanding in the four-county area amounted to 57% of the total dollar amount; loans to individuals in the four-county area amounted to 72% of the total dollar amount; lines of credit outstanding amounted to 49% of the total dollar amount; personal trusts originating within the four-county area amounted to 83.1% of the total; and, demand deposits originating within the four-county area amounted to 75.4% of the total dollar amount.

Notwithstanding the fact that some of these percentage figures, at first blush, appear to be substantial, it is the opinion of the Court that the plaintiff has failed to establish that the four-county area is the appropriate section of the country in which to test the legality of the merger.

Commercial bank markets are extremely complex. It is difficult to pin point a specific locale as the relevant geographic market. PNB and Girard compete in the international, national, regional, as well as the local, markets depending upon the particular service and the customer involved.

In addition, the relevant geographic market is a bilateral concept. Not only must the Court consider the origin of the bank's business, but equally as important are the alteratives available to the customer. Borrowers are not limited by political boundaries, although the smaller ones are limited in range. The alternatives available necessarily depend on the size and financial condition of the customer.

The larger customers definitely have alternatives ranging from regional to national. It was very surprising to learn at the trial of this case that not only New York banks solicit and receive substantial business from customers within the four-county area, but

also large banks from all the larger cities in the nation do likewise. Further, the Court is satisfied that PNB and Girard derive a substantial amount of business from without the four-county area.

What then is the "section of the country"? At the very least, it must include the entire Delaware Valley (i.e., Philadelphia, Bucks, Montgomery, Delaware, Chester, Camden, Burlington and Gloucester counties, the last three being in New Jersey), or the ten-county area referred to by the defendants and definitely New York City. However, it probably would be more accurate to state that the relevant geographic market in which PNB and Girard compete includes the greater part of the northeastern United States.

Unfortunately, the Court does not have comparative figures on the relative size of the defendant banks' business in these areas as contrasted with local banks. Plaintiff has confined its proof almost solely to the four-county area. For this reason, the Court could terminate its discussion of the Clayton Act at this point. The legality of a merger cannot be tested without a relevant market. However, the Court will assume, although it holds otherwise, for the remainder of the opinion that the plaintiff has proved that the four-county area is the "section of the country."

The Clayton Act

With this arguendo assumption (i.e., that plaintiff has established the four-county area as the relevant geographic market), the issue arising under the Clayton Act can now be stated: Whether the proposed merger of PNB and Girard may substantially lessen competition or tend to create a monopoly in commercial banking in the four-county area, in violation of Section 7 of the Clayton Act.

The plaintiff contends that the proposed merger is in violation of Section 7 because of the following reasons: (1) the undeviating trend toward banking concentration in the four-county area; (2) the direct, substantial competition which will be eliminated; (3) the unlikelihood of substantial new entrants into the business; and (4) the much larger resources the merged bank would have.

Plaintiff places considerable weight on the second reason above listed. Cited is the often quoted section of the House Report which reads in relevant part:

> "The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition. . . ." H. R. Rep. No. 1191, 81st Cong. 1st Sess. (1949), p. 8.

It is the plaintiff's position that the elimination of Girard, which defendants readily admit is in direct competition with PNB, will substantially suppress and lessen competition with the consequent tendency to monopoly.

Defendants, on the other hand, submit that the legislative history of the 1950 amendment to Section 7 of the Clayton Act discloses clearly that Congress did not intend that a merger or acquisition would be unlawful merely by reason of the elimination of competition between two business enterprises. It is argued that the basic test is whether, after considering all of the rele-

vant factors, there is a reasonable probability of a significant reduction in the vigor of competition.

It is the opinion of this Court that the defendants have correctly stated the proper test. As mentioned previously, the key factor in all the antitrust laws is the preservation of vigorous competition. Unfortunately, Congress has not spelled out any definite formula for judging the legality of a merger under Section 7. Consequently, several different tests have been used or suggested, many of which have been subjected to severe criticism. However, the most practical one, from this Court's point of view, is that recognized in *American Crystal Sugar Co. v. Cuban-American Sugar Co.,* 259 F. 2d 524, 527 (1958):

> "And the ban on a substantial lessening of competition 'in any line of commerce in any section of the country,' requires, for determination of a violation, first, a definition of a relevant market in which a lessening of competition has probably occurred and, second, analysis of the nature and extent of the competition within that market. Consequently, the parties are agreed that an acquisition is not illegal because of its impact on competition between the corporations involved: that the proper test is one of the *qualitative* substantiality of the resulting effect on competition in the relevant market. We too agree. We hold that only an acquisition which in the long run may reasonably be expected to substantially lessen competition within a relevant market, will violate Section 7 as amended." (Emphasis supplied)

The "qualitative substantiality" test, in contradistinction to "quantitative substantiality", requires an appraisal of all the relevant factors, not merely a determination of the aggregate share of the market

which would be held by the merged banks. A qualitative analysis is the only procedure which this Court feels justified to follow. This type of an approach, however, is not without difficulty. Involved is a selection of those factors which can be considered relevant.

The Court will discuss and answer the following relevant questions: (1) How much of an increase in concentration will be brought about by the merger? (2) Will the increase in concentration give the merged bank the power to control the price and supply of banking services? (3) Will the merger eliminate a substantial competitor from the market? (4) What is the competitive situation among commercial banks in the relevant market today? (5) What will probably be the competitive situation after the merger? (6) What is the probability of a new commercial bank coming into existence in the four-county area? (7) What is the history of defendants with respect to prior mergers?

The Court is not unmindful of the fact that the relevancy of many of these factors has been challenged more than once. Nevertheless, the Court believes that the answers to these questions, considered collectively, rather than individually, will be valuable in predicting the vigor of competition in the relevant market after the merger. Perhaps other questions might also be posed. The Court, however, thinks that those presented are sufficient to give the correct answer. It should be noted that in this discussion, the Court will not advert to the benefits of the proposed merger. The Court is convinced that the merger will definitely benefit the community, but does not consider this particularly relevant in the present discussion of the question posed. The questions and discussions thereon follow:

(1) Increase in Concentration: As of December 31, 1960, there were 41 commercial banks with head offices in the four-county area, operating 284 commercial

banking offices throughout Philadelphia, Bucks, Montgomery and Delaware counties. The largest bank, as of June 30, 1960, had total assets equal to 22.9% of the assets of all commercial banks with head offices in the four-county area. PNB ranked second with 21%, and Girard, third with 16.1%. After the merger, the defendants would have approximately 37.1% of all the assets of all commercial banks within the four-county area.

PNB, as of October 3, 1960, had total net loans equal to 19.8% of the total loans made by all commercial banks with head offices in the four-county area. Girard had 14.6% of the total. The remaining three largest commercial banks in the four-county area, as of the same date, had 23.8%, 10.2%, and 9.1% respectively, of total net loans of all commercial banks with head offices in the four-county area. The combined bank would hold approximately 34% of all the loans of all commercial banks with head offices in the four-county area.

PNB, as of October 3, 1960, had total deposits equal to 21.3% of the total deposits of all commercial banks with head offices in the four-county area. Girard had 14.5% of the total. The other three largest commercial banks, as of the same date, had total deposits representing 22.1%, 9.9% and 9.3%, respectively, of total deposits of all commercial banks with head offices in the four-county area. The combined bank would hold approximately 36% of all the deposits of all commercial banks with head offices in the four-county area.

The defendants rebut this increase in concentration charge with some figures of their own. Although the Court does not consider concentration in other cities decisive in this case, some of the percentage figures are nevertheless worthy of mention and consideration. If the 53 reserve and central reserve cities of the Federal

Reserve System are ranked in the order of the percentage of total commercial banking assets in each city held by the largest commercial bank in that city as of June 1956, Philadelphia would, after the proposed merger, rank 32nd with 36.16%. Of the 224 cities in the United States with populations over 500,000 in 1956, 190 had a commercial bank with 35% or more of the total commercial banking assets in the city. There are four commercial banks in the United States, each with a lending limit greater than the aggregate of the lending limits of all the commercial banks in Philadelphia. Each of 20 commercial banks in the United States has a lending limit greater than that of any commercial bank in Philadelphia, and 9 of these are in cities smaller than Philadelphia. 13 such banks, 4 of which are in cities smaller than Philadelphia, have a lending limit greater than that of the proposed merged bank. The Court finds that no dangerously potential concentration will result from this merger.

(2) Power to Control Price and Supply of Banking Services: The plaintiff has not pressed this point in its post-trial brief. However, Dr. Oscar Goodman, Professor of Finance at the Graduate School of Business of Northwestern University, testified for the plaintiff that the merged bank would have the power to affect the price and supply of available bank credit within the four-county area. The Court is satisfied, however, that defendants have proved this to be impossible. Entirely too much competition exists at all levels to permit such an occurrence. The merged bank would lose a substantial amount of business in a brief period of time if it attempted to dictate the price and/or control the supply of credit in the four-county area. The increase in size would not be sufficient for market domination. Because there are so many alternative choices for borrowers of all sizes, the merged bank would be un-

able to cause its competitors to raise service charges or interest rates, or prevent any borrower fom having his banking needs met by other commercial banks.

(3) Elimination of a Substantial Competitor: Defendants do not (indeed they cannot) deny that substantial direct competition will be eliminated by the merger. PNB and Girard compete in the offering of banking services as well as in the acquisition of branch sites in the contiguous three counties. A substantial part of the transcript of testimony is directed to this area. However, the figures previously set out speak for themselves. Nothing would be gained in reciting the additional facts with respect to this phase of the case. Suffice it to state that the plaintiff has established that PNB and Girard do engage in substantial direct competition one with the other, but the Court, as discussed more fully infra, finds that the elimination of one competitor will not result in a lessening of vigorous competition in the commercial banking field.

(4 and 5) Competition: It is fair to say that competition among commercial banks in the four-county area is extremely vigorous. The plaintiff has not suggested otherwise; but, notwithstanding the established fact that Girard, a substantial competitor of all commercial banks in the four-county area, would be eliminated by the merger, the defendants contend that competition in the four-county area would be intensified *after the merger.*

Defendants produced several witnesses, including many representatives of other Philadelphia commercial banks, who testified that competition, after the merger, would be increased rather than lessened. For example, W. Carlton Harris, Emeritus Professor of Finance at the University of Pennsylvania and a director of the Broad Street Trust Company, testified that the merger would sharpen and probably increase com-

petition among Philadelphia banks. He stated that this was the effect of previous mergers in the area. Samuel Weinrott, Chairman of the Board of Industrial Valley Bank and Trust Company, asserted that banking competition in Philadelphia today is greater than it was ten years ago. It was his opinion that competition would be increased by the merger. Mr. Weinrott stated, as did many of the other bankers, that he expected to acquire new business from defendants' customers who might have accounts with both PNB and Girard, or who might not approve of the merger for one reason or another. He also testified that smaller banks can and do compete actively with larger banks, and that previous mergers have not hindered the growth of the smaller banks. This opinion was substantiated by the exhibits produced, charting the rate of growth of the small commercial banks. Albert T. Mason, President of Liberty Real Estate Bank and Trust Company, Hubert J. Horan, Chairman of the Board of Broad Street Trust Company, and S. Harry Galfand, Chairman of the Board of Citizens and Southern Bank, all repeated in substance the testimony of Mr. Weinrott.

Lewellyn A. Jennings, Senior Vice-President of the Republic National Bank of Dallas, and former Acting Comptroller of the Currency, testified that competition among commercial banks was never keener and that all commercial banks are after mass banking business, competing for small and medium size loans. It was also his opinion that the merger will increase existing and potential competition in commercial banking in the Philadelphia area.

Dr. Warren Smith, Professor of Economics at the University of Michigan, however, testified that the elimination of a large lender will significantly reduce the degree of competition because an important alternative source of credit for many borrowers, over a

rather wide area, will be eliminated. Indeed, this is the crux of the plaintiff's case. He, Professor Smith, without any banking experience, stands alone in this forecast which the Court does not accept.

It is true that one alternative source of credit will be eliminated. It should be noted, however, that borrowers would have available the following alternatives after the merger: 41 commercial banks for loans up to \$10,000; 39 for loans up to \$25,000; 35 for loans up to \$50,000; 27 for loans up to \$100,000; 18 for loans up to \$250,000; 10 for loans up to \$500,000; 7 for loans up to \$1,000,000; 4 for loans up to \$2,500,000; 3 for loans up to \$5,000,000; 2 for loans up to \$7,000,000; and 1, as a result of the merger, for a loan up to \$15,000,000. If these alternative sources intend to compete more vigorously than before, thereby increasing rather than decreasing the competitive pressure, Dr. Smith's conclusion that the merger will significantly reduce the degree of competition does not necessarily follow. Moreover, the main bone of contention here is that the merger will have its most serious effects on small and medium size borrowers. The above figures, however, indicate to the Court that there are more than an adequate number of sources for these types of borrowers. In fact, it has been established that a borrower turned down by three banks would be unable, with few exceptions, to obtain a loan at another commercial bank. And, of course, those borrowers in need of larger loans are not limited to the few banks in Philadelphia capable of making such a loan.

It is the conclusion of this Court that all indications are that competition will be even more vigorous after the merger than before.

(6) Probability of New Entrant: Plaintiff contends that it is very unlikely a substantial competitor will enter the market. Although the number of commercial

banks in the four-county area has decreased from 108 in 1947 to 42 in 1960, it is nevertheless a fact that a commercial bank has been established in the last decade just outside Philadelphia, the Bank of Old York Road, which has experienced rapid and substantial growth. It would be pure conjecture on the part of this Court, however, to predict that a substantial competitor will not likely enter the market in the future.

(7) Past Acquisitions: It has been established that a substantial part of the present size of both PNB and Girard has been achieved as the result of merger and consolidation in the last ten years. However, it has been shown that mergers with existing banks in the suburbs of Philadelphia were, in many cases, the only feasible way for larger banks to follow the migration of many of their customers into these areas. In addition, in many cases, it appears that small banks in the four-county area have found mergers with larger banks to be a solution to their problems of inadequate banking services, rising costs, and management succession.

In summary, it can be said that although the merger will increase concentration to the percentage figures given, the merged bank would have no power to control the price and supply of credit, nor could it dominate the market in any manner. And, although a direct substantial competitor will be eliminated, the only competent testimony upon the subject establishes that competition will be more vigorous after the merger. Also, although the commercial banking field is not an easy one to enter, it cannot be concluded that a new bank will not be established in the four-county area in the future. Finally, although the defendants have engaged in prior mergers, these mergers have had valid business purposes as the motivating force.

Viewing all this collectively, the Court can see no reasonable probability that competition among com-

mercial banks in the four-county area will be substantially lessened.

Moreover, it is difficult to perceive a reasonable probability that this merger will tend to create a monopoly in commercial banking in the four-county area. Certainly, every time one bank in an area is eliminated, the path toward an eventual monopoly or oligopoly is shortened. This can be said for the most insignificant combination. But this does not mean that a monopoly is inevitable. Especially is this true in the area of bank mergers. Every future merger in the four-county area will be subject to the close scrutiny of the appropriate state and federal agency. At some point any trend, if discernible in the future, will be checked. Although some of plaintiff's witnesses, for the most part independent bankers from smaller communities throughout the country, were of the opinion that approval of this merger would trigger others in the four-county area, as well as the remainder of the United States, this Court is not prepared to concur. The competitive situation that exists in the four-county area, with the many alternatives available to a prospective customer, leads to the inescapable conclusion that any tendency to monopoly or oligopoly at this stage is nonexistent. What happens in the future must be left to the appropriate federal banking agency, and, if necessary, to another Court at another time. All that is being said is that this particular merger will not tend to create a monopoly.

The Sherman Act

This Court has also been called upon to decide whether the combination of PNB and Girard will result in an unreasonable restraint of trade or commerce in commercial banking in the four-county area in violation of Section 1 of the Sherman Act. Of course, the

same assumption with respect to the relevant geographic market applies here as it did when the Clayton Act was considered.

Very briefly it can be stated that a merger which does not violate the Clayton Act can hardly be held to violate the more stringent standards of the Sherman Act.

Even aside from any consideration of the Clayton Act, however, the plaintiff has failed to establish by a fair preponderance of the evidence that the proposed merger constitutes an unreasonable restraint of trade or commerce. To warrant an injunction restraining an alleged violation of Section 1, there must be a definite factual showing of illegality. *Standard Oil Co. v. United States,* 283 U. S. 163, 179 (1931).

In *United States v. Columbia Steel Co.,* 334 U. S. 495, 527-528 (1948), the Supreme Court laid down some guidelines to be considered when an acquisition of assets is being challenged under the proscriptions of the Sherman Act:

> "It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its

activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed."

The Court does not intend to repeat the facts considered when discussing the alleged violation of the Clayton Act. Suffice it to state that a re-evaluation of them, in light of what has been said above, convinces the Court that the proposed merger meets the "reasonable" test and does not violate Section 1 of the Sherman Act.

Findings of Fact and Conclusions of Law

The Government has submitted 600 proposed Findings of Fact and numerous proposed Conclusions of Law. The Court has reviewed these in great detail. Many of them have to do with separate lines of commerce which clearly are not applicable since the Court has found that the line of commerce is commercial banking in all its integral parts. An inordinate number refer to the four-county area which the Court has determined not to be the relevant market. Many have no bearing on the decision of the action.

The Court, therefore, makes the following rulings on the Government's proposed Findings of Fact:

Nos. 1 to 8 incl. affirmed; 9 and 10 refused as stated; 11, 12, 13 affirmed; 14 refused as stated; 15, 16, 18 affirmed; 19 refused as stated; 20 to 23 incl. affirmed; 24, 25 refused as stated; 26, 27, 28 affirmed; 29, 30, 31 refused as stated; 32 affirmed; 34 refused as stated; 35 affirmed; 36 refused as stated; 37 affirmed; 38 refused as stated; 39, 40 affirmed; 41 refused as stated; 42 affirmed; 43 refused as stated; 44 to 47 incl. affirmed; 48 refused as stated; 49 affirmed; 51, 52, 53 refused as stated; 54 to 68 incl. affirmed; 69 refused as

stated; 70 affirmed; 71 refused as stated; 72, 73, 74, affirmed; 75 refused as stated; 76 to 82 incl. affirmed; 83 refused as stated; 84, 85 affirmed; 86, 87 refused as stated; 88, 89, 90 affirmed; 91 to 157 incl. refused as stated as not pertinent to the decision of this case; 158 to 231A refused as stated, since these requests are designed to establish separate lines of commerce, and the Court has determined commercial banking, in all its relevant integral parts, is the line of commerce involved; 232 to 285 incl., the statistical tables are approved; the conclusions therefrom which the plaintiff asked the Court to draw are denied, and the remaining parts are refused as stated; 286 to 290 incl. affirmed; 291 refused as stated; 292 to 297 incl. affirmed; 298 refused as stated; 299 to 318 incl. affirmed; 319 refused as stated; 320 to 325 affirmed; 326 refused as stated; 327, 328 affirmed; 329, 330, 331 refused as stated; 332 affirmed; 333 to 335 incl. refused as stated; 336 to 345 affirmed; 346 refused as stated; 347, 348, 349 affirmed; 350 refused as stated; 351 affirmed; 352 refused as stated; 353 affirmed; 354 refused as stated; 355, 356 affirmed; 357 refused as stated; 358 affirmed; 359 refused as stated; 360 affirmed; 361, 362 refused as stated; 363 to 384 incl. affirmed; 385, 386 refused as stated; 387, 388, 389 affirmed; 390, 391 denied; 392, 393, 394 affirmed; 395, 396 refused as stated; 397 to 401 incl. denied; 402 to 431 incl. refused since they presuppose a four-county relevant market which the Court has found to be nonexistent; 432 to 458 affirmed; 459 refused as stated; 460, 461 affirmed; 462 denied; 463 to 471 affirmed; 472, 473 refused as stated; 474 affirmed; 475 to 600 incl. refused as stated; these requests are argumentative, do not completely reflect the situations developed by the testimony, and do not reflect the findings of the Court as set forth in the Opinion.

The Conclusions of Law submitted by the plaintiff are refused as stated.

The affirmation of plaintiff's proposed Findings is subject to the Findings of the Court as to the facts of the case set forth in the Opinion, and in the event of any possible conflict between the proposed Findings of Fact and statements made in the Opinion, the language of the Opinion shall govern.

Of the defendants' requested Findings of Fact, Requests Nos. 54, 55, 58 to 92, and Request No. 162 are refused as stated and the remainder Requests are affirmed.

In the event of any possible conflict between defendants' requested Findings of Fact and statements made in the Opinion, the language of the Opinion shall govern.

All Conclusions of Law requested by the defendants are refused as stated.

Resume

As before stated, this is the first action tried after the passage of the Bank Merger Act of 1960. The controversy inherent in the case between co-ordinate branches of the Executive Department of Government is to be regretted. Congress, in passing the Bank Merger Act, deliberately fixed the responsibility of approving or disapproving proposed mergers of national banks in the Comptroller of the Currency. This responsibility was fixed despite vigorous protests of individual bankers and the Department of Justice. The Comptroller of the Currency then, by Act of Congress, was of necessity required to consider the reports of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Attorney General, with respect to the competitive factors involved. All three of these Departments of Government reported that

in the opinion of their experts, the consummation of the proposed merger would adversely affect competition in the Philadelphia area. The Federal Deposit Insurance Corporation concluded that the merger would not be adverse in the regional, national and international field of competition. With these reports available to him, and after considering them, the Comptroller, in pursuance of his statutory duty, reviewed them and despite their content, approved the merger as not involving undue concentration of banking power, not tending toward a monopoly, not destructive of competition in the commercial banking field, and definitely in the public interest. The Court, after a full trial, agrees completely with the conclusions of the Comptroller of the Currency.

This is one of the few instances in which one Department of the Government, after having been consulted and its advice not being followed, has challenged in the Court the findings of a co-ordinate Department of the Executive Branch of the Government on the basis of disagreements between Departments of our Government. And what is the expertise of these three dissenting co-ordinate branches of the Executive Department that prompted this challenge? The Courts have uniformly held that once Congress has reposed its confidence in the expertise of a particular Department, the Courts should not substitute its judgment in the place and stead of the Department involved. The Government has asked this Court, without the production of a single shred of evidence, and on the basis of reports no more illuminating than that of the Comptroller of the Currency, to give legal effect to the conclusions of the dissidents, rather than the Department charged with the responsibility.

This Court fails to see how any court, without some factual basis being laid therefor, could accede to any

such request and this is all the more true in this particular case where experienced, substantial bankers throughout this entire area have appeared in open court, subjected themselves to searching cross-examination, and have unanimously demonstrated that the proposed merger would not cause an undue concentration of banking, would not tend toward a monopoly, and definitely would increase the vigor of competition which the Congress of the United States from the passage of the Sherman Act down to the present date has, by law, attempted to foster.

The Court was not impressed with the attempts of the Government to show that banking is of minor importance in the life of a community generally and of almost absolute unimportance in the business life of the community. The Government, in its attempt to establish this contention by testimony that no single particular individual industrial organization had ever entered a partcular territory because of the presence or absence of banking facilities, has ignored the industrial history of the United States. Should one ever speculate as to whether any industry would enter a community without banking facilities, the answer would be completely obvious. Historically, banking facilities have preceded industry in every community.

The Government also attempted to show that by combining the lending limits of all Philadelphia banks, borrowers in the larger categories could be well accommodated. This ignores again the realities of the situation and the positive testimony that in the larger industries, there is a decided reluctance on the part of financial officers to be made the subject of participating loans. With the originating bank, there is also an aversion to these loans as it requires considerable negotiation and technical handling which is to be avoided wherever possible.

The evidence demonstrated beyond peradventure of doubt that the Philadelphia area, plus parts of Delaware and New Jersey, and also New York City, as well as most of the northeastern part of the United States, is the area of active competition for Philadelphia commercial banks and for the proposed merged bank. The testimony discloses that the competitive effect upon all Philadelphia commercial banks will be minimal. The larger bank, however, will be able to compete on better terms and in a better atmosphere with the banks of other cities and states that have been draining this area of banking business which might well be and perhaps properly should be handled here, and which cannot be handled under present circumstances. That it will benefit the city and area has been established clearly by a fair preponderance of the evidence, as has been set forth in the Findings of Fact of the defendants previously affirmed.

There is nothing in this record which supports the averments of the complaint that the proposed merger involves an unlawful combination in restraint of trade; would result in or tend toward monopoly, or violate the provisions of the Clayton Act, if applicable; and the proposed merger certainly violates no provision, either express or implied, contained in the Bank Merger Act of 1960.

Since the proposed merger contains none of the defects alleged in the Government's case and will be in the public interest, it follows that judgment must be entered in favor of the defendants and against the plaintiff.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter.

2. The Bank Merger Act of 1960 does not, by its

terms, remove bank mergers from the application of either the Sherman Antitrust Act or the Clayton Act.

3. The approval of the merger by the Comptroller of the Currency, under the Bank Merger Act, is not the final and exclusive determination of its legality.

4. The proposed merger of the Philadelphia National Bank and the Girard Trust Corn Exchange Bank is not within the scope of Section 7 of the Clayton Act.

5. Plaintiff has failed to prove that the merger would violate Section 7 of the Clayton Act, even assuming the same to be applicable, because the preponderance of credible evidence shows:

(a) That the four-county area is not the relevant geographic market (see plaintiff's requests 5, 6, and 372);

(b) Even assuming that the four-county area is the relevant geographic market, credible evidence shows that the proposed merger will not substantially lessen competition or tend to create a monopoly in commercial banking in the four-county area.

6. The plaintiff has failed to prove by a fair preponderance of credible evidence that the merger will unreasonably restrain trade and commerce in commercial banking either in the relevant geographic market or in the four-county area.

7. Defendants are entitled to judgment dismissing the complaint in its entirety on the merits.

An order dismissing the action with prejudice will be filed concurrently with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION 29287

UNITED STATES OF AMERICA, PLAINTIFF,

v.

THE PHILADELPHIA NATIONAL BANK AND GIRARD TRUST CORN EXCHANGE BANK, DEFENDANTS

ORDER

AND NOW, to wit, this 15th day of January, 1962, for the reasons set forth in the Opinion filed concurrently herewith, it is ORDERED, ADJUDGED AND DECREED that the prayers in the Complaint of the plaintiff, United States of America, that the agreement of consolidation between defendants, The Philadelphia National Bank and Girard Trust Corn Exchange Bank, be adjudged and decreed to be unlawful, in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act, and that the defendants, The Philadelphia National Bank and Girard Trust Corn Exchange Bank, be enjoined from carrying out the said agreement of consolidation, be and they are hereby DENIED; further, that the action be and it is hereby DISMISSED ON THE MERITS, with prejudice.

BY THE COURT:

/s/ THOMAS J. CLARY,
Ch.J.

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